No. 92-1180-CFX Title: United States, Petitioner
v.
James Daniel Good Real Property, et al.

Docketed: January 8, 1993 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Nov 25 1992	Application (A92-415) to extend the time to file a petition for a writ of certiorari from December 9, 1992 to January 8, 1993, submitted to Justice O'Connor.
	Nov 25 1992	Application (A92-415) granted by Justice O'Connor extending the time to file until January 8, 1993.
	Jan 8 1993	Petition for writ of certiorari filed.
	Feb 9 1993	Order extending time to file response to petition until March 6, 1993.
	Feb 18 1993	Brief of respondents James Daniel Good Real Property, et al. in opposition filed.
	Feb 24 1993	DISTRIBUTED. March 19, 1993
	Mar 16 1993	Reply brief of petitioner filed.
	Mar 22 1993	Petition GRANTED.
		**********
	May 4 1993	Order extending time to file brief of petitioner on the merits until May 13, 1993.
	May 6 1993	Brief amici curiae of Kentucky, et al. filed.
	May 13 1993	Joint appendix filed.
	May 13 1993	Brief of petitioner United States filed.
	Jun 7 1993	Brief amicus curiae of Institute for Justice filed.
	Jun 11 1993	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Jun 14 1993	Brief amicus curiae of National Assoc. of Criminal Defense Lawyers filed.
	Jun 14 1993	Brief of respondents James Daniel Good Property, et al. filed.
	Jul 15 1993	Reply brief of petitioner filed.
	Aug 2 1993	Record filed.
	Aug 2 1993	Record filed.
	Aug 6 1993	CIRCULATED.
	Aug 16 1993	SET FOR ARGUMENT WEDNESDAY, OCTOBER 6, 1993. (2ND CASE).
	Oct 6 1993	ARGUED.

92-1180

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the seizure of the respondent real property for forfeiture, pursuant to a warrant issued by a magistrate judge based on a finding of probable cause, violated the Due Process Clause of the Fifth Amendment because the owner (who did not reside on the premises) was not given notice and an opportunity for a hearing prior to the seizure.

2. Whether a civil action under 21 U.S.C. 881(a)(7) for forfeiture of property used in the commission of a drug offense can be statutorily time-barred even if it is filed within the five-year statute of limitations in 19 U.S.C. 1621.

PARTIES TO THE PROCEEDING

The petitioner in this civil forfeiture action is the United States of America. The respondent is the parcel of real property that is the subject of the forfeiture action. James Daniel Good, the owner of the property, filed a claim and participated in the proceedings below.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, as amended on denial of rehearing (App., *infra*, 1a-17a), is reported at 971 F.2d 1376. The opinions of the district court (App., *infra*, 18a-22a, 23a-33a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1992. A petition for rehearing was denied on September 10, 1992. App., *infra*, 2a. On November 25, 1992, Justice O'Connor extended the time within which to

file a petition for a writ of certiorari to and including January 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution, the Due Process Clause of the Fifth Amendment, 21 U.S.C. 881, and 19 U.S.C. 1600-1610 and 1621 are reproduced at App., *infra,* 34a-49a.

STATEMENT

1. On January 31, 1985, state law enforcement officers executed a warrant authorizing the search of the respondent real property, owned by James Daniel Good. That search uncovered 89 pounds of marijuana, marijuana seeds, vials containing hashish oil, drug paraphernalia, and more than $7000 in United States currency. On July 3, 1985, Good pleaded guilty to one count of promoting a harmful drug in the second degree, in violation of Hawaii Revised Statutes § 712-1245(1)(b) (1989). He was sentenced to one year's imprisonment, a period of community service, and a $1000 fine, and he forfeited $3187 in cash found on the premises. App., *infra,* 3a, 23a; C.R. 45, Exh. B (findings of fact and conclusions of law in state forfeiture proceedings).[1]

2. On August 8, 1989, the United States filed this in rem action in the United States District Court for the District of Hawaii, seeking forfeiture of the property under 21 U.S.C. 881(a)(7) on the ground that it had been used to commit or facilitate commission of a federal drug offense. On August 18, 1989, a United States Magistrate Judge signed a warrant authorizing seizure of the property. The warrant was based upon an affidavit of Special Agent Robert Aiu of the Drug Enforcement Administration, which relied on the evidence seized during the January 1985 search of the premises by state police and on Good's guilty plea. App., *infra,* 3a; C.R. 29, Exh. F.

[1] "C.R." refers to the Clerk's Record filed in the court of appeals.

The property was seized on August 21, 1989, pursuant to the warrant. Good was living in Nicaragua at the time, and the house was occupied by tenants. The tenants were permitted to remain on the premises, but were directed to pay their rent to the government. App., *infra,* 24a. On October 18, 1989, Good filed a verified claim to the property and an answer to the complaint. C.R. 9, 10.

In an order dated September 11, 1990, App., *infra,* 23a-33a, the district court rejected Good's contention that the forfeiture action was not timely filed. *Id.* at 28a-30a. It pointed out that by virtue of 21 U.S.C. 881(d), forfeiture proceedings based on violations of the federal drug laws are governed by the procedures under the customs laws. App., *infra,* 29a. The applicable statute of limitations under the latter laws, 19 U.S.C. 1621, provides that "[n]o suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered." The instant forfeiture action is timely, the court concluded, because it was filed less than five years after the search of the premises on January 31, 1985, which uncovered the evidence on which the forfeiture is based. App., *infra,* 30a. The district court also held that the seizure of the property without prior notice to Good and an opportunity to be heard did not violate the Due Process Clause. *Id.* at 33a.

In a subsequent order dated September 26, 1990, the district court granted the United States' motion for summary judgment. App., *infra,* 18a-22a. It first rejected

Good's argument that the state warrant authorizing the 1985 search was not supported by probable cause, and that the evidence seized during that search therefore should be excluded in these forfeiture proceedings. *Id.* at 19a-21a. The court found a number of indicia that the confidential informants on whom the State relied were reliable, including their apparently recent observation of a "large scale marijuana operation" on the premises and the likelihood that the instrumentalities of that operation would remain there for long periods of time. *Id.* at 20a-21a.

The court then concluded, "based on the recovery of substantial amounts of drugs and drug instrumentalities," that the United States had established probable cause that the property was used to facilitate a violation of 21 U.S.C. 841, and was therefore subject to forfeiture. App., *infra,* 21a. The burden accordingly shifted to Good to show by a preponderance of the evidence that the property was not subject to forfeiture, 19 U.S.C. 1615, by demonstrating either (1) that the property was not used for an unlawful purpose, or (2) that he was an innocent owner within the meaning of 21 U.S.C. 881(a)(7). The court found that Good had failed to carry that burden, noting that it was "satisfied that the [respondent] property was used for illegal purposes based on the drugs and drug instrumentalities located within the property," and that Good had offered no evidence of innocent ownership. App., *infra,* 21a-22a. The court therefore declared the property forfeited to the United States. *Id.* at 22a.

3. The court of appeals affirmed in part and reversed in part, and remanded for further proceedings. App., *infra,* 1a-17a.

a. Over Judge Noonan's dissent, the court of appeals first held that the district court had erred in finding the action timely because it was brought within the five-year limitations period in 19 U.S.C. 1621. App., *infra,* 4a-12a.

The court of appeals accepted Good's argument that 19 U.S.C. 1621 only establishes an "outer limit" for filing a forfeiture action, and that further limits are imposed by 19 U.S.C. 1602-1604. App., *infra,* 5a. Those provisions, the court explained, impose a "series of internal notification and reporting requirements," under which "customs agents must report to customs officers, *see* 19 U.S.C. § 1602, customs officers must report to the United States attorney, *see* 19 U.S.C. § 1603, and the Attorney General must 'immediately' and 'forthwith' bring a forfeiture action if he believes that one is warranted, *see* 19 U.S.C. § 1604." App., *infra,* 5a. In the court's view, the reporting duties under 19 U.S.C. 1602-1604 are made applicable to DEA and FBI agents in the present setting by 21 U.S.C. 881(d), because those agents are designated to seize property subject to forfeiture under the Controlled Substances Act. App., *infra,* 11a (quoting 21 C.F.R. 1316.72).

The court of appeals rejected the government's contention that the duties stated in 19 U.S.C. 1602-1604 to act promptly apply only where the property has already been seized, and therefore were inapplicable in this case because the respondent property was not seized until after the forfeiture action was commenced. The court pointed out that 19 U.S.C. 1602 and 1603 refer to the discovery of violations of the law as well as seizures of property, and it reasoned that the duty of customs officers (and therefore of DEA and FBI agents) to report promptly to the Attorney General is triggered in both situations. App., *infra,* 7a-11a. The court accordingly remanded for the district court to determine when Special Agent Aiu or any other DEA Agent obtained actual knowledge of the alleged offense. *Id.* at 11a-12a.[2]

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[2] The court of appeals concluded that the presence of an IRS agent when state police searched the premises in 1985 did not trigger the

Judge Noonan dissented on the limitations issue, expressing the view that the majority "has converted a set of housekeeping rules for the government into statutory protection for the property of malefactors." App., *infra,* 17a. He reasoned that once property has been used in the commission of a narcotics offense, it is subject to forfeiture. It followed that "[t]he government is free to claim the forfeiture any time after the offense is discovered. The only relevant restriction is the statute of limitations, which bars suit five years after the time of discovery." *Ibid.* In Judge Noonan's view, the majority's opinion not only, "in effect, creates a new statute of limitations," but "also provides a new construction of a statute that has been in existence for almost seventy years and has been applied in a variety of contexts to customs offenses without any court ever giving the statute the application given in this case." *Ibid.*

b. The court of appeals further held that the seizure of the premises without giving Good prior notice and an opportunity for a hearing violated his due process rights. App., *infra,* 12a-16a. The court recognized that the Ninth Circuit previously had held that property subject to forfeiture may be seized without prior judicial review. But it distinguished those cases on the ground that all except one involved personal property that could be removed from the jurisdiction, and that in the one exception, *United States* v. *Tax Lot 1500,* 861 F.2d 232 (1988), cert. denied, 493 U.S. 954 (9th Cir. 1989), the court did not (in the view of the panel here) resolve the question whether due process requires prior notice and opportunity for a hearing in connection with the seizure of real property for forfeiture. App., *infra,* 12a-13a.

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reporting duty the court found under 19 U.S.C. 1602 and 1603, because IRS agents were neither authorized to seize property nor bound to report the alleged offense. App., *infra,* 11a-12a.

With its own precedents thus put to one side, the court of appeals noted that *Mathews* v. *Eldridge,* 424 U.S. 319, 335 (1976), had identified a number of factors relevant to a due process analysis, including the significance of the property interest, the risk of erroneous deprivation, the probable value of additional procedures, and the governmental interests at stake. App., *infra,* 13a-14a. It also noted that, under *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), due process ordinarily requires notice and an opportunity to be heard prior to a deprivation of property and that exceptions to that rule are warranted only in "extraordinary situations," often characterized by "a special need for very prompt action." App., *infra,* 14a (quoting 407 U.S. at 91). The court found no such circumstances here. App., *infra,* 14a-16a.

The court of appeals recognized that extraordinary circumstances were found in *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974), which held that notice and an opportunity to be heard were not required prior to seizure of a yacht for forfeiture. But it distinguished *Calero-Toledo* on the ground that the seizure there was of personal property. App., *infra,* 14a. In the court of appeals' view, "real property is distinct from personal property" for due process purposes, because the fact that real property cannot be moved eliminates the *Fuentes* factor of a need for "very prompt action." *Ibid.* Although Good was not occupying the respondent property in this case as his home (see page 3, *supra*), the court also relied on the notion that forfeiture of a person's home has implications for the balancing of factors under *Mathews* v. *Eldridge,* because "[p]eople have a particularly strong interest in their homes, and the government has a less significant interest in seeking forfeiture prior to giving notice and an opportunity to be heard." App., *infra,* 15a.

The court of appeals acknowledged that its finding of a due process violation in these circumstances conflicts with the Eleventh Circuit's decision in *United States* v. *A Single Family Residence & Real Property Located at 900 Rio Vista Blvd.*, 803 F.2d 625, 632 (1986), which reached the "opposite conclusion." App., *infra*, 15a. The court believed, however, that its holding was supported by *United States* v. *Property at 4492 S. Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989), which also involved the seizure of a personal residence. App., *infra*, 15a.[3]

REASONS FOR GRANTING THE PETITION

This case presents two important issues under the federal forfeiture laws, and the court of appeals seriously erred in its disposition of each. The Due Process Clause does not require notice and an opportunity for a hearing before property is seized for forfeiture, especially where, as here, the seizure was made pursuant to a warrant issued by a neutral and detached magistrate on the basis of probable cause. There is a square circuit conflict on this issue of recurring importance, and it warrants resolution by this Court. The court of appeals also erred in holding that 19 U.S.C. 1602-1604 confer a right on a claimant to have a forfeiture action dismissed—even if it was brought within the five-year statute of limitations, and even if there has

[3] Although the court of appeals found a due process violation, it concluded that the violation need not invalidate the forfeiture (assuming that the district court finds on remand that the filing of this forfeiture action was timely). That is so, the court reasoned, because "[t]he 'mere fact of the illegal seizure, standing alone, does not immunize the [seized] goods from forfeiture.'" App., *infra*, 16a (quoting *United States* v. *One 1971 Harley-Davidson Motorcycle*, 508 F.2d 351 (9th Cir. 1974)). The court nevertheless held, without elaboration, that Good is entitled to the rents the United States collected from the tenants following the seizure. App., *infra*, 16a.

been no seizure of the claimant's property and the claimant has shown no prejudice—if government officials did not act with sufficient dispatch in carrying out what the court itself characterized as "internal" reporting and suit-filing duties under those statutory provisions. This ruling by the court below cannot be reconciled with this Court's holding in *United States* v. *$8850*, 461 U.S. 555, 563 n.13 (1983), that the same statutory scheme does not impose a privately enforceable filing deadline short of the five-year statute of limitations in 19 U.S.C. 1621. It also threatens to disrupt the orderly investigation of alleged violations of federal law. Accordingly, the limitations issue likewise warrants review.

1. The court of appeals erred in holding that the seizure of the respondent property pursuant to a warrant based on a magistrate's finding of probable cause violated the Due Process Clause of the Fifth Amendment because Good was not given notice and an opportunity to be heard prior to the seizure. Under 21 U.S.C. 881(b), the government is expressly authorized to request issuance of a warrant authorizing seizure of property subject to forfeiture "in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure." The government followed that procedure in this case, seeking a warrant based on an ex parte showing of probable cause, as provided in Fed. R. Crim. P. 41. The decision of the court of appeals, however, effectively holds the statutory authorization for seizures pursuant to a warrant unconstitutional as applied to seizure of a house.

Moreover, the decision below squarely conflicts with the Eleventh Circuit's decision in *United States* v. *A Single Family Residence & Real Property Located at 900 Rio Vista Blvd.*, 803 F.2d 625, 631-632 (1986), which held that due process permits the seizure of a residence even without a warrant. See also *United States* v. *Property Located at 4880 S.E. Dixie Highway*, 838 F.2d 1558, 1561-1562 (11th

Cir. 1988). By contrast, other courts, agreeing with the Ninth Circuit in this case, have held that notice and opportunity for a hearing are required prior to seizure of a residence. See *United States* v. *Property at 4492 S. Livonia Rd.*, 889 F.2d 1258 (1989), reh'g denied, 897 F.2d 659 (2d Cir. 1990); *United States* v. *A Parcel of Land, Appurtenances, and Improvements, Known as 92 Buena Vista Ave.*, 937 F.2d 98, 101 (3d Cir. 1991) (dicta), cert. granted on other issues, No. 91-781 (argued Oct. 13, 1992).[4] The Court should resolve the circuit conflict on this constitutional issue of recurring importance.

a. As an initial matter, the court of appeals did not state what sort of hearing is required before a house (and the land to which it is appurtenant) may be seized for forfeiture. Nor did the court state what legal issue must be decided at the hearing—*i.e.*, whether the hearing is to be on the issue of probable cause (or some similar interlocutory showing of a likelihood of success on the merits), or whether the government is barred from seizing the property until it obtains a final judgment of forfeiture. Presumably, the court intended only the former. The Fourth Amendment certainly suggests that no more is required. It states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fourth Amendment only protects against *unreasonable* seizures of property, and indicates that where, as

[4] Cf. *Richmond Tenants Org.* v. *Kemp*, 956 F.2d 1300 (4th Cir. 1992) (notice and hearing required prior to eviction of public housing tenant in connection with seizure for forfeiture of leasehold interest).

here, the seizure is pursuant to a warrant based upon probable cause, it is, by definition, reasonable for purposes of the Fourth Amendment. Because the Fourth Amendment specifically regulates the seizure of property by the government for law enforcement purposes, it, rather than the Fifth Amendment's Due Process Clause, should be the point of reference in determining the lawfulness of a seizure in the forfeiture context. Compare *Graham* v. *Connor*, 490 U.S. 386, 394-395 (1989) (Fourth Amendment, rather than Due Process Clause, is source of limitations on use of force in seizing person).

The decision in *United States* v. *Monsanto*, 491 U.S. 600 (1989), also supports the conclusion that no more than probable cause was necessary in order to permit the seizure in this case. *Monsanto* sustained the validity of a pretrial order in a criminal case that barred the defendant from transferring his property (including a home and apartment) prior to trial. The Court explicitly held "that assets in a defendant's possession may be restrained in the way they were here based on a finding of probable cause to believe that the assets are forfeitable." 491 U.S. at 615. The Court explained that it had "previously permitted the Government to seize property based on a finding of probable cause to believe that the property will ultimately be proved forfeitable" (*ibid.*, citing *United States* v. *$8850*, 461 U.S. 555 (1983), and *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)), and that "[h]ere, where respondent was not ousted from his property, but merely restrained from disposing of it, the governmental intrusion was even less severe than those permitted by our prior decisions." *Ibid.* "Indeed," the Court continued, "it would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent's possession, based on a finding of probable cause, when we have held that (under appropriate circumstances), the

Government may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense." 491 U.S. at 615-616 (citing *United States* v. *Salerno*, 481 U.S. 739 (1987)). The Court concluded that the property could be subject to a similar pretrial restraint to assure its "appearance" at trial and to "protect the community's interest in full recovery of any ill-gotten gains." 491 U.S. at 616.[5]

b. The Court in *Monsanto* observed in a footnote that it did not have to consider whether the Due Process Clause requires a hearing before a pretrial restraining order may be imposed, since the Second Circuit had ordered that such a hearing be held and the district court had already conducted the hearing. 491 U.S. at 615 n.10. It would, however, be a considerable departure from historical practice to require an adversarial hearing on the question of probable cause to support a warrant. Warrants authorizing the search and seizure of property have traditionally been based on an ex parte showing of probable cause. The text of the Fourth Amendment validates that practice, for it requires only that probable cause be "supported by Oath or affirmation." See *Franks* v. *Delaware*, 438 U.S. 154, 164-169, 171 (1978).

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[5] As the Second Circuit recognized in *Livonia Road*, 889 F.2d at 1267-1268, the government makes out a prima facie case of forfeiture in a civil forfeiture proceeding by establishing probable cause, and it may do so on the basis of an affidavit such as that submitted by the DEA agent in this case. See 19 U.S.C. 1615. Thus, the submission to the magistrate in this case not only established sufficient grounds for issuance of the warrant for seizure of the property pending entry of final judgment; it also made out a prima facie case on the *merits* and entitled the United States to a final judgment of forfeiture unless Good carried his burden of rebutting the showing or establishing the innocent owner defense, which he failed to do. See page 4, *supra*.

There is no reason for a different result here. As the Second Circuit pointed out in *Livonia Road*, the Court has applied the Warrant Clause of the Fourth Amendment with particular firmness in the context of the search of a house. See 889 F.2d at 1264 (citing *Payton* v. *New York*, 445 U.S. 573, 590 (1980), and *United States* v. *Karo*, 468 U.S. 705, 714 (1984)).[6] But nothing in the Fourth Amendment suggests that something *beyond* the usual warrant practice—issuance of a warrant by a neutral and detached magistrate, based on a showing of probable cause—is required for the search or seizure of a house. Indeed, the first portion of the Fourth Amendment speaks of the people's right to be secure in their "houses" in the same terms as their right to be secure in their "persons, * * * papers, and effects." Because the Fourth Amendment specifically addresses the subject of the seizure of persons and property for law-enforcement purposes, the courts should be reluctant to impose additional procedural requirements through the Due Process Clause.

c. In *Calero-Toledo*, the Supreme Court rejected the contention that due process required notice and an opportunity for a hearing prior to the seizure of a yacht that allegedly was used to transport drugs.[7] The Court relied

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[6] Indeed, the Second Circuit has declined to apply *Livonia Road* to the seizure of rental or commercial property. *United States* v. *141st Street Corp.*, 911 F.2d 870, 874-876 (1990), cert. denied, 111 S. Ct. 1017 (1991). Under the Second Circuit's view in the *141st Street* decision, *Livonia Road* should not apply here, because Good no longer used the house as his personal residence at the time of the seizure; he had rented it out. But cf. *United States* v. *All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896 (2d Cir. 1992) (following *Livonia Road* in connection with seizure of business premises where seizure resulted in destruction of business).

[7] In *Calero-Toledo*, the seizure was not made pursuant to a warrant, and the Court stated that it had "no occasion to address * * * whether the Fourth Amendment warrant or probable-cause requirements are

on three considerations: (1) the seizure served significant governmental interests, because it permitted the government to assert in rem jurisdiction over the property in forfeiture proceedings, and thereby fostered the public interest in preventing further illicit use of the property and enforcing the drug laws; (2) "preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given"; and (3) unlike in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), the seizure was initiated not by self-interested private parties, but by government officials. 416 U.S. at 679.[8]

The court of appeals sought to distinguish the instant case from *Calero-Toledo*—and held that pre-seizure notice and an adversarial hearing were required—on the basis of its belief that the second of the three factors identified in *Calero-Toledo* is inapplicable to real property, which cannot be moved. App., *infra*, 14a-15a. This analysis is flawed.

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applicable to seizures under the Puerto Rican statutes." 416 U.S. at 680 n.14. Similarly here, because the seizure was made pursuant to a warrant issued on the basis of a finding of probable cause, there is no occasion to determine whether (and, if so, to what extent) the Fourth Amendment's probable-cause and warrant requirements apply in the forfeiture setting.

[8] As the Court also noted in *Calero-Toledo*, 416 U.S. at 679 n.14, *Fuentes* itself had distinguished a seizure under a search warrant from a seizure under a writ of replevin, on the grounds (1) that a search warrant is generally issued to serve highly important governmental needs and is generally issued in situations demanding prompt action, and (2) that the Fourth Amendment guarantees that the government will not relinquish control over seizures to private parties and that a warrant will not issue except upon probable cause. See 407 U.S. at 93 n.30.

The Court did not state in *Calero-Toledo* that each of the three factors it identified is invariably a necessary condition for a seizure without prior notice and hearing to be constitutional, as the court of appeals seemed to believe. The Court simply identified the considerations it found relevant. Moreover, even as regards the second factor, on which the court below relied, the Court stated only that the property seized will "often" be of a sort that could be removed, destroyed, or concealed; thus, the Court was addressing property subject to forfeiture on a categorical basis, and did not seem to regard it as essential that the particular property at issue in a given case be shown to be capable of being (or likely to be) removed, destroyed, or concealed. And even though real property cannot be removed or concealed, a house or other structure on the property could be destroyed or damaged by an owner who had advance warning. Other governmental interests also weigh against a special rule for real property, including the possibility of danger to the seizing agents if the owner or occupant of the premises is tipped off in advance, and the owner's use of the hearing contemplated by the court below to obtain discovery (including disclosure of the identity of informants) in a parallel criminal investigation or prosecution that may be underway at the same time.

It also is significant that in *Calero-Toledo*, both the owner and the lessee were entirely dispossessed of the yacht during the forfeiture proceedings. Here, by contrast, Good's tenants were permitted to remain on the premises, just as they did prior to the seizure, with the rents to be paid to and held by the government pending the outcome of the forfeiture proceedings. Because the Fifth Amendment states that "[n]o person shall * * * be deprived of * * * property, without due process of law," the limited nature of the deprivation is relevant in deciding what process is due. Accordingly, the fact that the exigency justifi-

cation might generally have less force in the real property context is offest by the fact that the deprivation in this case was far less substantial than that in *Calero-Toledo*.

The conclusion that *Calero-Toledo* addresses seizures of property for forfeiture purposes on a categorical basis also is supported by the Court's subsequent decisions in *$8850* and *United States* v. *Von Neumann*, 474 U.S. 242 (1986). In *$8850*, the claimant conceded that the government was not constitutionally required to afford her an opportunity for a hearing before it seized the property for forfeiture under the customs laws. 461 U.S. at 562. The Court observed in a footnote that the general rule is that in the absence of an "extraordinary situation," a party may not invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified. But, significantly, the Court stated that it "ha[d] previously held that such an extraordinary situation exists when the government seizes items subject to forfeiture." 461 U.S. at 562 n.12 (citing *Calero-Toledo*). This statement is written in categorical terms: it does not say that the requisite extraordinary situation "may exist" when the government seizes property for forfeiture; it says that such a situation "exists." The Court then continued by stating that *Calero-Toledo* "clearly indicates that due process does not require federal customs officials to conduct a hearing before seizing items subject to forfeiture," and that the governmental interests found decisive in *Calero-Toledo*—including that "pre-seizure notice might frustrate the statutory purpose"—were equally present in the customs setting. *Ibid.* The Court reiterated this point in *Von Neumann*. 474 U.S. at 249 n.7. Although the property at issue in both *$8850* and *Von Neumann* was moveable, the Court did not rely on or even mention that fact in its discussion of the pre-seizure due process issue.

d. Finally, the seizure of property for in rem forfeiture on the basis of an ex parte finding of probable cause compares favorably with procedures governing the seizure of a person. An individual is not entitled to an adversarial hearing on the legitimacy of the seizure before it is effectuated, although he may thereafter be released on bail pending the criminal trial itself. See *Baker* v. *McCollan*, 443 U.S. 137, 142-143 (1979). As the Court noted in *Monsanto*, if such procedures are adequate for seizures of the person, which implicate the fundamental interest in liberty, then parallel procedures should be adequate for seizures of property. Compare *FDIC* v. *Mallen*, 486 U.S. 230 (1988) (sustaining statute providing for suspension of bank director upon grand jury's finding of probable cause). The parallel here is close. The property was seized pursuant to a warrant on the basis of probable cause, but it was "released" to Good's tenants pending trial of the forfeiture action.[9] The parallel is further supported by the fact that, as the Court explained in *Calero-Toledo*, in forfeiture proceedings, the property itself is the defendant because the property itself was the wrongdoer; the defendant property therefore should also be subject to seizure on the basis of probable cause. The arrangement with the tenants served the same purpose as bail—namely, to regulate custody of the defendant pending trial and to secure the presence of the defendant at trial.

A prior hearing would have served no purpose in this case in any event. Good had pleaded guilty in state court to a drug offense, and the basis for the seizure and forfeiture was a statement of the evidence seized from the house by state law enforcement officials during the search

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[9] See also *$8850*, 461 U.S. at 569 (discussing ways in which claimant may obtain hearing after seizure).

that led to the state prosecution. For this reason, the court of appeals' apparent view that the historical practice of issuing a warrant on the basis of an ex parte showing of probable cause presents an unacceptable risk of an erroneous deprivation, see App., *infra,* 13a-14a, rings especially hollow in this case.

2. The court of appeals also erred in imposing a "promptness" obligation—judicially enforceable through the sanction of dismissal—on the institution of forfeiture proceedings, even where the five-year limitations period in 19 U.S.C. 1621 has been satisfied. The provisions of the customs laws on which the court of appeals relied in reaching that unprecedented result, 19 U.S.C. 1602-1604, impose internal obligations on government officials; they do not furnish a statutory basis for dismissal of a forfeiture action. The court of appeals' ruling to the contrary is inconsistent with this Court's disposition of the statute-of-limitations issue in *$8850*, and it threatens uncertainty and disruption in the investigation of violations of federal laws. Review of this issue is therefore warranted as well.

a. The customs laws (which are incorporated by reference into 21 U.S.C. 881) furnish protection to private persons from undue delay by the government in instituting forfeiture proceedings in the usual manner in which the law affords protection against stale claims—through a statute of limitations. See *United States* v. *Lovasco,* 431 U.S. 783, 788-789 (1977). Thus, 19 U.S.C. 1621 provides that "[n]o suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered." This statute of limitations unquestionably confers an enforceable right on a person claiming an ownership interest in property against which the United

States has brought a forfeiture action, and it may be pleaded by the claimant as an affirmative defense in answering the government's forfeiture complaint. See Fed. R. Civ. P. 8(c).

There is no reason to believe that Congress intended 19 U.S.C. 1602-1604 to confer an additional right on a claimant to have a forfeiture action dismissed, even where the action was brought within the five-year limitations period under 19 U.S.C. 1621. Rather, as the court of appeals itself stated, those provisions "establish a series of *internal* notification and reporting requirements," under which "customs agents must report to cutsoms officers, *see* 19 U.S.C. § 1602, customs officers must report to the United States attorney, *see* 19 U.S.C. § 1603, and the Attorney General must 'immediately' and 'forthwith' bring a forfeiture action if he believes that one is warranted, *see* 19 U.S.C. § 1604." App., *infra,* 5a (emphasis added). Especially when juxtaposed against the limitation imposed by 19 U.S.C. 1621 for the benefit of property owners and other private persons, the most natural reading of the quite different provisions in 19 U.S.C. 1602-1604 is that they are internal housekeeping measures designed to regulate (and promote expedition in) the conduct of government personnel for the benefit of the government.

That interpretation is supported by the background of the relevant statutory provisions. Language requiring customs officials to proceed "without delay" appears in statutes governing civil penalties for customs violations at least as early as 1799. See Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 695-696; *Stockwell* v. *United States,* 80 U.S. (13 Wall.) 531, 542-543 (1871). As one commentator has observed:

> The great antiquity of the language indicates that its purpose was not to protect "due process rights" that

were as yet undreamt, but rather to insure that federal customs revenues were collected in a timely fashion. This was absolutely essential because such duties "constituted the principal source of federal revenues from 1789 until World War I."

Since the purpose of the promptness language in sections 1602 and 1604 is to protect the fisc rather than claimants' due process rights, these statutes also do not provide claimants with a non-constitutional basis for raising a delay defense.

1 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 12.01, at 12-27 to 12-28 (1992) (quoting *United States* v. *Laurenti*, 581 F.2d 37, 41 n.12 (2d Cir. 1978), cert. denied, 440 U.S. 958 (1979)).[10] It would be inconsistent with the purpose of promoting the government's financial interests to recognize a personal right in a claimant to require dismissal of the government's action to recover a forfeiture or penalty where the government's own agents did not move with sufficient dispatch on its behalf *within* the time allowed by the statute of limitations. Compare *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 716-722 (1990); *Brock* v. *Pierce County*, 476 U.S. 253 (1986).[11]

Furthermore, the language in 19 U.S.C. 1604 directing the Attorney General to cause proceedings to be instituted

[10] The Second Circuit held in *Laurenti* that 19 U.S.C. 1602-1604 do not furnish a basis for a court to dismiss an indictment based on delay between the time the government learned of the violation and the time the indictment was returned.

[11] See also *Air Courier Conf.* v. *American Postal Workers Union*, 111 S. Ct. 913 (1991); *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3186 (1990) ("[T]he failure of an agency to comply with a statutory provision requiring 'on the record' hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be 'adversely affected within the meaning' of the statute.").

"forthwith" and "without delay" is followed by language stating that he need not do so if he "decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises." Because this language assumes the continued existence of the Attorney General's discretion in enforcing the laws, it greatly undercuts the notion that 19 U.S.C. 1602-1604 circumscribe that discretion to the extent of imposing the severe sanction of dismissal. *Laurenti*, 581 F.2d at 43. If Congress had intended 19 U.S.C. 1602-1604 to constitute the equivalent of a speedy trial act, "one would suppose that Congress would have set some specific deadlines, as it did in the Speedy Trial Act itself. 18 U.S.C. § 3161-74. Here there are simply generalities—'immediately' to inquire, 'forthwith' to commence prosecution, to prosecute 'without delay.' " *Laurenti*, 581 F.2d at 43.

Finally, a construction of 19 U.S.C. 1602-1604 that supported dismissal of a forfeiture action would create incentives to investigate possible violations of the law with undue haste, to the disadvantage of both the property owner and the government. See *Laurenti*, 581 F.2d at 43-44; *United States* v. *Lovasco*, 431 U.S. at 793. That result would be especially unjustified where, as here, the property in question was not seized prior to commencement of the forfeiture proceedings, and the owner therefore suffered no prejudice and had no substantial countervailing equities during any period of pre-filing delay.

b. For the foregoing reasons, the text, structure, background and purposes of the customs laws weigh against the court of appeals' construction of 19 U.S.C. 1602-1604. But in addition, that construction cannot be reconciled with the disposition of the statutory timeliness issue by this Court in *$8850*.

In *$8850*, the Court announced a flexible four-part test (drawn by analogy from the speedy trial test under *Barker* v. *Wingo*, 407 U.S. 514 (1972)) for assessing the lawfulness under the Due Process Clause of delay between seizure of property and institution of judicial forfeiture proceedings. In doing so, however, the Court rejected the approach of *United States* v. *Thirty-seven Photographs*, 402 U.S. 363 (1971). In that case, the Court read time limits into a different statutory provision to ensure a prompt disposition of objections to the seizure of allegedly obscene materials, and thereby to avoid a substantial question concerning the constitutionality of the statutory scheme under the First Amendment. The Court reasoned in *$8850* that even if it "were inclined to interpret the statutes here in such a way as to avoid any due process question, it would be impossible to read into the statutory scheme, as we did in *Thirty-seven Photographs*, a short statute of limitations, since 19 U.S.C. § 1621 (1976 ed., Supp. V) expressly allows the Government to bring a civil forfeiture proceeding within five years." 461 U.S. at 563 n.13. The court of appeals' reading of a short (and vague) limitations period into 19 U.S.C. 1602-1604 cannot be reconciled with this holding in *$8850*.

The court of appeals sought to avoid the import of footnote 13 in *$8850* by labeling it mere "dicta" and by expressing the view that this Court "did not examine the effects of competing obligations under sections 1602-04." App., *infra*, 7a. The court was wrong on both counts. This Court elsewhere discussed the statutory framework created by 19 U.S.C. 1602-1604 (see 461 U.S. at 557-558 & n.3), and specifically considered in footnote 13 whether the "statutes" involved in the case (which included 19 U.S.C. 1602-1604) could be construed to avoid a due process problem by imposing a filing deadline shorter than the five years allowed by 19 U.S.C. 1621. The Court held that they

could not. If the Court had concluded otherwise, it could have avoided the constitutional issue, just as it had in *Thirty-seven Photographs*. Footnote 13 in *$8850* therefore cannot be dismissed either as mere dicta or as being unrelated to 19 U.S.C. 1602-1604. It follows that the decision below squarely conflicts with *$8850*.

c. Prior to *$8850*, some courts of appeals had followed the approach of *Thirty-seven Photographs* in cases governed by 19 U.S.C. 1602-1604 and dismissed forfeiture actions for failure to satisfy the promptness standards the courts found in those provisions, thereby avoiding the question of what limits the Due Process Clause imposes. See, *e.g.*, *United States* v. *Sarkisian*, 472 F.2d 468 (10th Cir.), cert. denied, 414 U.S. 976 (1973); *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146, 1151-1156 (4th Cir. 1974); *United States* v. *One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977); *United States* v. *One 1971 BMW 4-Door Sedan*, 652 F.2d 817, 819 n.1 (9th Cir. 1981). Those decisions do not survive *$8850*, which makes clear that the Due Process Clause is the sole source of protection (aside from the five-year statute of limitations in 19 U.S.C. 1621) from delay prior to institution of forfeiture proceedings. The Ninth Circuit has now resurrected the discredited rationale that 19 U.S.C. 1602-1604 impose judicially enforceable limitations independent of the Due Process Clause.[12]

This case presented an especially inappropriate occasion for doing so. Prior cases under 19 U.S.C. 1602-1604 have

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[12] Indeed, the Ninth Circuit itself previously had recognized, after *$8850*, that those statutory provisions impose no enforceable standards independent of the Due Process Clause. See *United States* v. *Two Hundred Ninety-Five Ivory Carvings*, 726 F.2d 529, 531 (9th Cir. 1984) ("the prompt referral implicitly required by § 1603 is a referral no later than the time judicial proceedings must be instituted to comply with constitutional due process").

involved seizure of the property prior to institution of forfeiture proceedings. See, *e.g.*, cases cited at page 23, *supra*. In that situation, the owner is dispossessed of the property and may experience hardship or disadvantage as a result. It is a radical departure from prior understandings to construe 19 U.S.C. 1602-1604 to require (subject to the sanction of dismissal) "prompt" referral of possible violations to the Attorney General and institution of judicial proceedings "without delay" where there has been no such seizure. In that setting, 19 U.S.C. 1602-1604, as construed by the court below, would constitute a judicially enforceable directive to complete an investigation hastily, despite the absence of any prejudice to the owner. The Constitution imposes no such limitations,[13] and there is no reason to suppose that Congress intended to do so.[14]

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[13] See *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966) ("[l]aw enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause"); *Lovasco*, 431 U.S. at 792 (due process imposes limits only on oppressive pre-indictment delay).

[14] By their terms, 19 U.S.C. 1602-1604 are directed primarily to the post-seizure situation. The requirement in 19 U.S.C. 1603(b) to report "promptly" to the United States Attorney where there has been a seizure or where a "violation of the customs laws is discovered"—on which the court of appeals relied, see App., *infra*, 9a—contains the further condition that "legal proceedings * * * in connection with such seizure or discovery are required." In the forfeiture context, legal proceedings are not "required" unless and until the property has been seized and administrative proceedings are either unavailable or have been completed. See 19 U.S.C. 1607, 1608. In the non-forfeiture context, legal proceedings likewise would not ordinarily be "required" following discovery of a violation of the law until after administrative proceedings for assessment of a penalty or for other purposes have been completed. See H.R. Rep. No. 621, 95th Cong., 1st Sess. 17 (1977) (explaining the purpose of the 1978 addition of "promptly" to the reporting requirement in 19 U.S.C. 1603 as being to ensure the availability of judicial review once administrative proceedings have been completed).

The Ninth Circuit's holding in this case that dismissal of the forfeiture proceeding nevertheless may be ordered based on "undue delay" is inconsistent with the Third Circuit's decision in *92 Buena Vista Avenue*. There, the court refused to order dismissal of a civil forfeiture action based on "undue delay" where, as here, the action was timely under the five-year limitations period in 19 U.S.C. 1621 and the property was not seized prior to institution of the forfeiture proceedings. 937 F.2d at 105.[15]

d. In light of the inconsistency between the decision below on the one hand and *$8850* and *92 Buena Vista Avenue* on the other—as well as the uncertainty and disruption the decision below threatens in the administration of various forfeiture programs and other law enforcement endeavors governed by 19 U.S.C. 1602-1604—review by this Court is warranted.

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[15] Although, as the court below pointed out (App., *infra*, 7a), the Third Circuit did not specifically discuss 19 U.S.C. 1602-1604, there is no reason to believe that the Third Circuit meant to exclude those statutory provisions from its consideration of the legal constraints on the government's actions in this setting.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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JANUARY 1993

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90-16636
D.C. No. CV-89-00612-HMF

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES DANIEL GOOD PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE TITLE NO. 249, 207, TAX MAP KEY NO. 1-6-008-233(3), LOCATED AT KEEAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

Argued and Submitted
December 11, 1991—San Francisco, California

Filed April 24, 1992
Amended September 10, 1992

ORDER AND AMENDED OPINION

Before: RUGGERO ALDISERT,* ALFRED T. GOODWIN, and JOHN T. NOONAN, JR., Circuit Judges.

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* Honorable Ruggero J. Aldisert, Senior Circuit Judge, Third Circuit, sitting by designation.

Opinion by Judge Goodwin; Dissent by Judge Noonan

ORDER

The opinion filed April 24, 1992, slip op. 4517 is amended as follows:

1. Slip op. at 4521, second paragraph, line 3: delete "On that same day," insert "On August 21, 1989,"

2. Slip op. at 4521, second paragraph, lines 9-10: delete "The actual seizure of Good's home occurred on August 21, 1989."

3. Slip op. at 4530, first paragraph, line 1: delete "warrant of arrest" insert "seizure warrant"

With the opinion thus amended, Judge Aldisert and Goodwin have voted to deny the petition for rehearing, Judge Noonan has voted to grant the petition for rehearing. Judges Aldisert and Goodwin have voted to recommend rejection of the suggestion for rehearing en banc, Judge Noonan has voted to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

GOODWIN, Circuit Judge:

This appeal challenges the civil forfeiture of a home pursuant to 21 U.S.C. § 881(a)(7),[1] the provision of the

[1] In 1984 Congress amended the Controlled Substance Act, Pub. L. 91-513, 84 Stat. 1242 (Oct. 27, 1970), to allow for the forfeiture of real proeprty. *See* Pub. L. 98-473, § 306(a), 98 Stat. 2050 (Oct. 12, 1984).

Controlled Substance Act that authorizes the forfeiture of real property. James Daniel Good challenged the forfeiture as untimely and as a violation of due process. The district court, exercising jurisdiction under 21 U.S.C. § 881(b), granted the government's motion for summary judgement. The district court found the action to be timely and in accordance with due process. Notice of Appeal was filed in compliance with Fed. R. App. P. 4(a). Our jurisdiction is based on 28 U.S.C. § 1291. We reverse and remand on the timing issue; we reverse on the due process question, finding that Good's rights were violated, and we affirm the district court in all other respects.

I.

On January 31, 1985, pursuant to a search warrant, Hawaii state police officer uncovered approximately 89 pounds of marijuana, marijuana seeds, vials containing hashish oil, and other drug paraphernalia. Good pleaded guilty on July 3, 1985 to promoting a harmful drug in violation of Hawaii Revised Statutes § 712-1245(1)(b). He served one year in jail and was placed on probation. He was also required in state court forfeiture action to surrender $3,187 in cash found on the premises.

Some four years later, on August 8, 1989, the United States filled the present action, seeking to forfeit Good's house and property pursuant to § 881(a)(7). On August 21, 1989, a Seizure Warrant directing U.S. Marshals to seize the defendant property was issued by a magistrate judge of the U.S. District Court of Hawaii. The affidavit in support of the seizure warrant was sworn by a DEA special agent and relied exclusively on evidence gathered in the January 31, 1985 state police search of Good's house.

Good filed a timely claim for the property. After discovery, in July 1990, Good filed a motion for summary

judgement and a motion for rents on the property collected by the government after the seizure. The government filed its own motion for summary judgement and moved to strike Good's claim. The district court denied Good's motions and granted the government's. This appeal followed.

II.

The United States sought forfeiture of Good's home four years after Good was convicted and sentenced on state drug charges and four and one half years after the underlying predicate acts occurred. Most of the forfeiture cases concerned with procedural and timing issues deal with lengthy delays between the initial seizure of property and the instigation of forfeiture proceedings. This case, however, is concerned with the effects of a lengthy delay between the underlying predicate acts and the initiation of forfeiture proceedings. The contention that the forfeiture was untimely involves the interpretation of statutes and is subject to review as a question of law. *Bunting v. United States*, 884 F.2d 1143, 1145 (9th Cir. 1989).

The Controlled Substance Act does not establish procedures to govern civil forfeiture, rather, section 881 incorporates the procedures outlined in the customs laws.

> The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter . . .

21 U.S.C. § 881(d). This court interprets 21 U.S.C. § 881 as incorporating the provisions "set forth in Title 19 of the

United States Code, sections 1602-21." *United States v. One 1971 BMW 4-Door Sedan*, 652 F.2d 817, 819 (9th Cir. 1981).

Section 1621 of the customs laws provides the statute of limitations for initiating customs forfeiture and penalty proceedings. It reads in pertinent part:

> No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered.

19 U.S.C. § 1621. The customs laws also outline specific obligations for customs agents and officers, as well as for U.S. attorneys and the Attorney General.

Good argues that the five year limitations period in section 1621 establishes an outer limit and that actions filed within the five year period may still be untimely if filed in violation of other relevant sections of the customs laws, *see* 19 U.S.C. §§ 1602-04.[2] These other provisions establish a series of internal notification and reporting requirements where customs agents must report to customs officers, *see* 19 U.S.C. § 1602, customs officers must report to the United States attorney, *see* 19 U.S.C. § 1603, and the Attorney General must "immediately" and "forthwith" bring a forfeiture action if he believes that one is warranted, *see* 19 U.S.C. § 1604.

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[2] Alternatively, Good asks us to adopt the reasoning of Judge Ferguson's concurring opinion in *United States v. Tax Lot 1500*, 861 F.2d 232, 236 (9th Cir. 1988) (Ferguson, J., concurring), *cert. denied*, 493 U.S. 954 (1989). Judge Ferguson argues that the language of 21 U.S.C. § 881(a)(7), the provision authorizing the forfeiture of real property, requires the prompt commencement of forfeiture proceedings. That issue was not properly before the court in *Tax Lot 1500* and we are not bound by the views of a concurring opinion. We are not persuaded by the argument and decline to make it a basis for our decision.

In *One 1971 BMW 4-Door Sedan* this court held that the mandates of sections 1602, 1603 and 1604 were applicable to 21 U.S.C. § 881 forfeitures. In that case, however, the Drug Enforcement Administration ("DEA") had already seized the property in question.

> Section 1602 impose[s] on the seizing officer a duty to report the seizure immediately to the appropriate DEA official; section 1603 require[s] the DEA official to report the seizure promptly to the appropriate United States Attorney for prosecution of the forfeiture and to include in that report a statement of all facts relevant to the seizure; and section 1604 require[s] the United States Attorney immediately upon receipt of that report to inquire into the facts of the case and the laws applicable thereto to determine "if it appears probable that . . . forfeiture has been incurred," and to institute proceedings "forthwith," unless, upon inquiry and examination, he decide[s] "that such proceedings probably cannot be sustained or that the ends of public justice do not require that they be instituted or prosecuted."

652 F.2d at 819-20.[3]

We have found no case which interprets the statute of limitations, section 1621, in light of the DEA's obligations under sections 1602-04. Some courts have applied the statute of limitations to various forfeiture actions without considering the possible limiting effects of sections 1602-04. The Third Circuit simply applied the five year rule in deciding that a forfeiture action initiated in 1989, based on predicate acts discovered in 1986, was not time

[3] In 1980 these provisions were amended to substitute "the Attorney General of the United States" and "the Attorney General" in the place of "United States attorney." *See* Pub. L. 96-417, 94 Stat. 1746 (Oct. 10, 1980). This amendment does not affect our analysis.

barred. *United States v. A Parcel of Land, Bldgs., App. & Imp.*, 937 F.2d 98, 105 (3rd Cir. 1991), *pet. for cert. pending*. The court found that there had been no undue delay, but was not asked to consider whether government officials complied with sections 1602-04. Similarly, two district courts have applied the five year rule without discussing the issue before this court. *See United States v. $116,000 in U.S. Currency*, 721 F. Supp. 701, 705 (D.N.J. 1989) (forfeiture action barred by § 1621); *United States v. 2401 S. Claremont*, 724 F. Supp. 670, 673 (W.D. Mo. 1989) (forfeiture action not barred by § 1621). The court in *2401 S. Claremont* relied on dicta found in a footnote of a Supreme Court opinion examining the due process implications of delaying the initiation of forfeiture proceedings once property has been seized. *See United States v. $8,850*, 461 U.S. 555, 563 n.13 (1983). The Court read section 1621 as creating a five year statute of limitations but, given that the issue was not before it, did not examine the effects of competing obligations under sections 1602-04. Finally, the First Circuit held that a ten month delay in initiating forfeiture proceedings was not unreasonable. *United States v. Land and Bldg. at 2 Burditt Street*, 924 F.2d 383, 385 (1st Cir. 1991). The court, however, also in dicta, expressed scepticism as to whether the government was free to initiate proceedings any time it chose within the five year period. *Id.*

The scope of the DEA's obligations under sections 1602-04 when there has not been a seizure of property and the relationship between these provisions and the statute of limitations, section 1621, are issues of first impression. The government contends that there is no conflict between the provisions because section 1604's mandate to the Attorney General applies only when property has been seized. According to this argument, nothing in sections 1602-04 pertain to the process or timing of the decision to

initiate forfeiture proceedings in the absence of seizure. The government concludes that it is free to seek forfeiture at any time within the five year statute of limitations.

Like any exercise in statutory interpretations, we begin by examining the language of the statute and assessing its plain meaning. *North Dakota v. United States,* 460 U.S. 300, 312 (1983); *United States v. Hurt,* 795 F.2d 765, 770 (9th Cir. 1986), cert. denied, 484 U.S. 816 (1987). Contrary to the government's assertion, the language of section 1604 does not restrict itself to situations where there has been a seizure of property.

> It shall be the duty of the Attorney General of the United States immediately to inquire into the facts of *cases reported to him by customs officers* and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred *by reason of such violation,* for the recovery of which the institution of proceedings in the United States district court or the Court of International Trade is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture . . .

19 U.S.C. § 1604 (emphasis added). Rather than speaking in terms of seizure, the section refers to those "cases reported to him by customs officers" as well as fines, penalties and forfeitures incurred by "such violation[s]."

To understand the meaning of these terms, it is necessary to examine section 1604 in the context of the reporting requirements of sections 1602 and 1603. Section 1602 provides:

> It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the appropriate customs officer for the district in which such violation occurred, and to turn over and deliver to such customs officer any vessel, vehicle, aircraft, merchandise or baggage seized by him, *and to report immediately to such customs officer every violation of the customs laws.*

19 U.S.C. § 1602 (emphasis added). The duty of agents to report to their superiors is not limited to those instances where they have seized property.

Similarly, section 1603 requires:

> Whenever a seizure of merchandise for violation of the customs laws is made, *or a violation of the customs laws is discovered,* and legal proceedings by the United States attorney in connection with such seizure *or discovery* are required, it shall be the duty of the appropriate customs officer to report such seizure *or violation* to the United States attorney for the district *in which such violation has occurred,* or in which such seizure was made, and to include in such report a statement of the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

19 U.S.C. § 1603(b) (emphasis added).

While it is clear that these provisions encompass seizures, we hold that the substance of the procedures outlined in sections 1602-04 is not limited to those instances where seizure of property has already occurred. The same procedural requirements apply when government agents who are bound by these provisions learn of violations of the law that may subject property to forfeiture.

Interpreting sections 1602-04 to require prompt government action when FBI and DEA agents have knowledge of

violations of the law implicating forfeiture does not render the five year statute of limitations meaningless. Section 1621 is not phrased to extend the government the authority to seek forfeiture at anytime within a five year period. Section 1621 is phrased in the negative: "No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered." 19 U.S.C. § 1621. As the First Circuit has reasoned, this section provides "that a forfeiture action cannot be brought after a lapse of five years; not that forfeiture may be commenced at any time within five years." *Land and Building at 2 Burditt Street,* 924 F.2d at 385 (dicta). Our interpretation of sections 1602-04 and 1621 is consistent with the face of the statute.

Moreover, the statute of limitations incorporates a discovery rule, which has been interpreted to employ a "known or should have known standard." An offense is discovered "when a 'party discovers or possesses the means to discover the alleged wrong, whichever occurs first.' " *$116,000 in U.S. Currency,* 721 F. Supp. at 703-04 (quoting *United States v. R.I.T.A. Organics, Inc.,* 487 F. Supp. 75, 77-78 (N.D. Ill. 1980)). The requirements of sections 1602-04, on the other hand, are triggered when knowledge of the alleged violation actually exists. Finally, section 1621 is applicable to the United States government as a whole. The mandates of sections 1602-04 are much narrower. The expedited reporting and action requirements apply only to those federal officers authorized to seize property, and they are triggered only when actual knowledge of a violation of a law potentially justifying forfeiture exists.

The policy reasons cited by the government for pursuing civil forfeiture after the termination of criminal proceedings does not require a different outcome. The government can cite no policy interest for waiting for four years after the termination of criminal actions. Additionally, as the government acknowledges, governmental concerns can be accommodated by requesting a stay in the civil proceeding.

It remains to be determined how duties directed to customs agents and officials are to be translated in the context of 21 U.S.C. § 881 for the purposes of civil forfeiture under the Controlled Substance Act. Section 881(d) provides

> that such duties that are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

21 U.S.C. § 881(d). Federal regulations designate those officers who can make seizures under the Controlled Substance Act. "For the purpose of carrying out the Act, all special agents of the Drug Enforcement Administration and the Federal Bureau of Investigation are authorized and designated to seize such property as may be subject to seizure." *See* 21 C.F.R. § 1316.72. Given that FBI and DEA agents are authorized to seize property, these agents are also bound by the reporting obligations of sections 1602 and 1603. Their reports of seizures *and* violations of the law implicating potential forfeitures trigger the Attorney General's obligations under section 1604.

In the raid on Good's house, an IRS agent accompanied the local police. This agent was neither authorized to seize property nor bound to report the alleged offense. His

presence did not trigger any of the requirements of sections 1602-04. Robert Aiu, a special agent for the DEA, ultimately swore the 1989 affidavit in support of the seizure warrant. The government refused to answer interrogatories directed at determining when Aiu or any other DEA personnel obtained actual knowledge of the alleged offense. We cannot determine from the record before us when the government's obligations under sections 1602-04 were triggered. Consequently, the record does not reveal whether the government acted in a prompt and timely fashion in compliance with the statute.

The case is remanded to the district court to develop the factual record necessary for this determination.[4]

III.

Good's home was seized pursuant to a seizure warrant issued by a United States magistrate. There was no prior notice or opportunity for the property owner to be heard before the seizure of his home. 21 U.S.C. § 881 does not provide for such a hearing. Good argues that the statute is an unconstitutional violation of due process both on its face and as applied. The government cites a phalanx of Ninth Circuit opinions that uniformly support the proposition that items subject to forfeiture may be seized without prior judicial review. *See United States v. One 1985 Cadillac Seville,* 866 F.2d 1142 (9th Cir. 1989);

[4] The facts of this case illustrate how sections 1602-04 and 1621 continue to have separate and independent meanings. It can fairly be argued that the discovery rule under § 1621 was triggered at the time of the state police search, especially given the presence of the IRS agent. The five year statute of limitations began to run at this time. Analysis under sections 1602-04, however, involves a separate inquiry. These provisions are implicated only when DEA or FBI agents obtain knowledge of the offense.

United States v. One 1971 BMW 4-Door Sedan, 652 F.2d 817 (9th Cir. 1981); *United States v. One 1972 Mercedes Benz,* 545 F.2d 1233 (9th Cir. 1976); *United States v. Tax Lot 1500,* 861 F.2d 232 (9th Cir. 1988), *cert. denied,* 493 U.S. 954 (1989).

All of these case, save one, have one thing in common: the seized property can be driven away and could find itself in another jurisdiction by sundown. The exception is *Tax Lot 1500,* which involved the forfeiture of real property. The government urges us to rest our decision on this case. The problem with *Tax Lot 1500,* however, is that it was argued and submitted as an eighth amendment case, not as a due process case. Neither the due process arguments nor the record before the court were sufficiently developeed to support the broad proposition cited by the government that the absence of a pre-seizure hearing can never raise constitutional questions, even when real property is being forfeited. *Tax Lot 1500* specifically reserved the issue of a potential facial challenge to § 881 and confined its holding to the statute as applied. The court found that the process afforded "sufficiently cured any possible constitutional defect" *in that case. See* 861 F.2d at 236.

Tax Lot 1500 does not provide a general framework for analyzing the due process implications of forfeiting real property and is of little help in resolving the issue in the present case. For guidance, we turn to the Supreme Court's decisions in *Mathews v. Eldridge,* 424 U.S. 319 (1976), *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974), and *Fuentes v. Shevin,* 407 U.S. 67 (1972). *Mathews v. Eldridge* identifies a number of factors that should be considered in determining whether or not there has been a violation of due process. Courts are instructed to consider the significance of the property interest at stake, the risk of erroneous deprivations given the procedures actually used, as well as the probable value of

additional procedural safeguards, and, finally, the government't interest in pre-notice seizure. 424 U.S. at 335.

Fuentes teaches that due process requires notice and an opportunity to be heard prior to the deprivation of a property interest. 407 U.S. at 80-82. Exceptions to this rule are warranted only in "extraordinary situations." The second of three defining characteristics of such an extraordinary situations is when there is "a special need for very prompt action." 407 U.S. at 91.

Calero-Toledo applied the *Fuentes* criteria to civil forfeitures holding that an exception to the general rule of notice and an opportunity to be heard is warranted when the property being forfeited is a yacht. Central to the Court's analysis was the fact that the property in question was personal property and that it was movable. "[T]he property seized—as here, a yacht—will often be the sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." 416 U.S. at 679. This case has been relied upon to establish the general proposition that due process does not require government officials to conduct hearings before seizing items of personal property that are subject to forfeiture.

Calero-Toledo, however, was decided before 21 U.S.C. § 881(a)(7) was adopted in 1984. Section 881(a)(7) made real property subject to civil forfeiture for the first time. We find that, for the purposes of due process analysis, real property is distinct from personal property. One of the unique aspects about a piece of land is that it cannot be easily moved, eliminating the *Fuentes* requirement for "very prompt action." The forfeiture of a person's home also has implications for the balance in *Mathews v. Eldridge*. People have a particularly strong interest in their homes, and the government has a less significant interest in seeking forfeiture prior to giving notice and an opportunity to be heard. The home will be there when the government decides to initiate forfeiture proceedings. The home will be there when the government delivers notice of its intent. Finally, the home will still be there for seizure if the government is successful on the merits of its action. These factors shift the balance struck in *Calero-Toledo* and in most instances will militate in favor of requiring a pre-seizure hearing before an individual's home can be taken.

The Second Circuit has grappled with the difficult issues raised by the seizure of a house. *See United States v. Property at 4492 S. Livonia Rd.,* 889 F.2d 1258 (2d Cir. 1989). In a well-reasoned opinion the court examined the factors identified in *Mathews v. Eldridge* and concluded that "under all the circumstances there were no exigent circumstances justifying the seizure of [the individual's] home when the forfeiture action was started." 88 F.2d at 1265. The court held that due process required the provision of a pre-seizure hearing. The Eleventh Circuit, in a cursory treatment of the question, has come to the opposite conclusion. *See United States v. A Single Family Residence,* 803 F.2d 625, 632 (11th Cir. 1986). We find the Second Circuit's analysis persuasive and reach a similar result.

Good has a substantial and unique interest in his home. The government's interest in avoiding a pre-seizure hearing is not significant in this case. The house is not going anywhere. It is not going to be "removed to another jurisdiction, destroyed or concealed." *Calero-Toledo,* 416 U.S. at 679. Any legitimate interest the government has may be protected through means less restrictive than seizure. "Any exigency that might be posed by threat of an encumbrance on, or transfer of, the property may be met by less restrictive means than seizure, for example, by the filing of a lis pendens . . . along with a restraining order or a bond requirement." *Livonia Road,* 889 F.2d at 1265. The gov-

ernment argues after a four and a half year delay that no pre-seizure hearing should be required because quick action was necessary. Government claims of urgency do not inspire confidence. The government does have a strong interest in seeing that the property is no longer used for illegal purposes, but this interest can be met through means less drastic than seizure of the real property. On the facts of this case we find that the statute, as applied, violated Good's rights to due process. Good was entitled to notice and an opportunity to be heard before his home was seized. We need not reach the facial challenge.

If on remand the district court finds the filing of this proceeding to be timely, the violation of Good's due process rights need not invalidate the forfeiture. The " 'mere fact of the illegal seizure, standing alone, does not immunize the [seized] goods from forfeiture.' " *United States v. One 1971 Harley-Davidson Motorcycle,* 508 F.2d 351 (9th Cir. 1974) (per curiam) (quoting *John Bacall Imports, Ltd. v. United States,* 412 F.2d 586, 588 (9th Cir. 1969); *see also Livonia Road,* 889 F.2d at 1265-66. Good is, however, entitled to the rents accrued during the illegal seizure of his home.

IV.

Other issues were briefed and argued on appeal and are found to be without merit. The district court is affirmed in all other respects. The case is remanded for a determination of when the DEA learned of the underlying violation and whether its subsequent actions complied with 19 U.S.C. §§ 1602-04. If the action is found to be timely, then summary judgement may be entered in favor of the government. If the action is untimely, then the case should be dismissed. In either instance, Good is entitled to the rents accrued on his home after seizure.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

NOONAN, Circuit Judge, concurring and dissenting:

I concur in all but Part II, as to which I dissent. In Part II, the court has converted a set of housekeeping rules for the government into statutory protection for the property of malefactors. Once property has been used in the commission of a narcotics offense it is subject to forfeit. 21 U.S.C. § 881(a). The government is free to claim the forfeiture any time after the offense is discovered. The only relevant restriction is the statute of limitations, which bars suit five years after the time of discovery. 19 U.S.C. § 1621.

The opinion of the court in Part II, in effect, creates a new statute of limitations. It also provides a new construction of a statute that has been in existence for almost seventy years and has been applied in a variety of contexts to customs offenses without any court ever giving the statute the application given in this case. The closest authority that the majority can find is dicta in a case that speaks of "due process implications" if a forfeiture were "brought against a property the owner of which already has been tried and acquitted." *United States v. Land Bldg. at 2 Burditt Street,* 924 F.2d 383, 386 (1st Cir. 1991). With all respect, these dicta are not authority for the surprising construction of the statute advanced here.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 89-00612 HMF

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE OF TITLE NO. 249,207, TAX MAP KEY NO. 1-6-008-233(3), LOCATED AT KEAAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT

[Filed Sept. 26, 1990]

ORDER DENYING CLAIMANT JAMES GOOD'S MOTION TO EXCLUDE EVIDENCE AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On September 1, 1990, Claimant James Good's ("Good") Motion to Exclude Evidence was heard by this court. That Motion is in essence a motion to suppress evidence recovered from defendant property pursuant to a state search warrant executed at the defendant property on January 31, 1985. On the same date, Plaintiff's Motion to Strike Claim and for Summary Judgment was also considered.

Because the outcome of plaintiff's Motion for Summary Judgment will turn in part on this court's resolution of Claimant Good's Motion, this Motion will be discussed first. Claimant Good urges this court to exclude all evidence recovered as a result of the search, which evidence included over 87 pounds of marijuana, an Ohaus Triple Beam scale, vials containing hashish oil, and over $7,000 in U.S. currency on the grounds that the affidavit in support of the search warrant was defective because it failed to set forth sufficient probable cause for the search. Specifically, claimant Good contends that because the affidavit fails to indicate when the informants made their observations of drugs and drug paraphernalia on the defendant property, the information is stale.

The government argues that a time period of ten days is referenced in the affidavit and that the ten days refers to when the information was provided to the police officer-affiant, as well as when the informants made their observations. Plaintiff has filed a Declaration of Officer Kenneth Mathison, the state police officer who was the affiant for the state search warrant, which sets forth an explanation of the ten day reference as being the time period within which the informants provided the information. Furthermore, the government argues that the timing of the observations is not the only and dispositive factor in this case or in cases like this; there are other factors relating to reliability of the information which support a probable cause finding.

This court will look only to the four corners of the affidavit and will not consider any other explanation, reason or evidence not otherwise available to the state judge at the time he reviewed the affidavit and determined that there was probable cause. Accordingly, in deciding claimant's Motion, this Court will not consider Officer Mathison's Declaration.

Although the staleness of the information is a factor determining probable cause, it is not the controlling factor. *United States* v. *Dozier,* 844 F.2d 701 (9th Cir. 1988). The court finds other indicia of reliability within the affidavit. First, the presence of two, not just one confidential informants provides the corroboration which is indicative of reliability. Second, the detailed description of the property by the informants is another factor demonstrating reliability. Third, one of the informants had provided reliable information to the affiant on four previous occasions. Based on these other indicia of reliability, the court is satisfied that the state court judge could have concluded there was probable cause for the search based on the affidavit itself.

However, not withstanding the other indicia of reliability, the exact language of the affidavit itself could lead to a reasonable interpretation that the informants' observations occurred within the last ten days from the preparation of the affidavit. The second full paragraph of page two of the affidavit provides: "Your affiant was informed within the last ten days, the exact date and time not given to protect the identity of the citizen informant, that he had observed etc." In order for there to be a meaningful conclusion as to why the exact date and time had not been given, to protect the identity of the informant, the state judge could have reasonably concluded, that the ten day period refers to when the informant made his observations, not when the informant provided the information to the police officer. This interpretation is consistent with the need to prevent the informant's identity from being revealed to the occupants/owners of defendant property, as opposed to when the informant met with the police officer. In order for the language "to protect the identity of the informant," to be meaningful, the time when the informants observed the drugs and visited defendant property must be safeguarded, not the time when the informants met with the police. The state judge could have reasonably concluded that the informants were on the premises and made their observations within the last ten days and that the time period therefore referenced when they made their observations.

Furthermore, because marijuana cultivation is a crime of ongoing nature, the state judge could have concluded, and had probable cause to conclude that the instrumentalities, tools and other paraphernalia of such a large scale marijuana operation were likely to remain on the premises for long periods of time. *United States* v. *Dozier,* 844 F.2d 701 (9th Cir. 1988).

Because this court finds that the state court could have concluded there was probable cause to support the search based on the affidavit, Claimant's Motion to Exclude is denied. Based on this finding, this court need not reach the issue of whether this case comes within the "good faith exception" set forth in *United States* v. *Leon,* 468 U.S. 898 (1983).

Having denied Claimant Good's Motion, all evidence of the marijuana and drug paraphernalia recovered on defendant property is admitted and this Court is satisfied that based on the recovery of substantial amounts of drugs and drug instrumentalities sufficient probable cause that the defendant property was utilized to facilitate the commission of a violation of Title 21, U.S.C. § 841 has been established. Once the government has established probable cause, the burden shifts to Claimant Good to prove by a preponderance of the evidence that the subject property is not forfeitable. *United States* v. *$39,000.00 in Canadian Currency,* 801 F.2d 1210 (10th Cir. 1986). This showing can be made either by demonstrating (1) that the property was not used for unlawful purpose; or (2) that the claimant is an innocent owner, as defined in 21 U.S.C. § 881

(a)(7). This court is satisfied that the defendant property was used for illegal purpose based on the drugs and drug instrumentalities located within the property. With respect to the second showing, Claimant Good has himself admitted in responses to discovery, that he will not present evidence that he is an innocent owner. (See Good response to Interrogatory No. 21(2)).

More importantly, Claimant Good does not present any evidence of innocent ownership in opposition to the government's Motion for Summary Judgment. That being the case, the Court finds that Claimant Good has failed to meet his burden by a preponderance of the evidence. The plaintiff's Motion for Summary Judgment is granted. Accordingly, defendant property is hereby forfeited to plaintiff United States of America.

SO ORDERED.

DATED: Sep. 26, 1990, at Honolulu, Hawaii.

/s/ Harold M. Fong
HAROLD M. FONG
U.S. District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 89-00612 HMF

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE OF TITLE NO. 249,207, TAX MAP KEY NO. 1-6-008-233(3), LOCATED AT KEAAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT

[Filed Sept. 11, 1990]

ORDER DENYING CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

BACKGROUND

On January 31, 1985, Hawaii county police officers and an Internal Revenue Service agent executed a state search warrant on the defendant property and discovered marijuana and hashish oil. Claimant Good, the record title owner of the property, was charged by the state of Hawaii with promoting a detrimental drug in the second degree on June 4, 1985. On August 7, 1985, claimant pled guilty to the offense and was sentenced to one year in jail, a period of community service, and a $1,000.00 fine.

On August 8, 1989, four years after claimant was sentenced in the state court criminal action, the United States government filed the present civil forfeiture action, seeking to forfeit defendant real property located on the Big Island pursuant to 21 U.S.C. § 881(a)(7) on the grounds that the property was used to facilitate the promotion of a controlled substance in violation of 21 U.S.C. § 841 *et seq.*

The property was seized on August 21, 1989, pursuant to a seizure warrant issued by a United States magistrate on August 8, 1989. The magistrate found probable cause to issue the federal seizure warrant based on the evidence found during the 1985 search of the property by the state of Hawaii.

At the time of the arrest, the defendant property was being leased by claimant Good to tenants. The government allowed the tenants to remain on the property, but their rental payments were directed to be made to the government. The government offered to allow claimant Good to resume occupancy of the property as substitute custodian, but he was unable to do so because of a prior commitment to work abroad for a charitable organization. In addition to his motion for summary judgment, claimant moves the court for an order awarding him the rent collected by the government from the date of seizure to the present.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987), *citing Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The movant must be able to show "the absence of a material and triable issue of fact," *Richards v. Neilsen Freight Lines,* 810 F.2d 898, 902 (9th Cir. 1987), although it need not necessarily advance affidavits or similar materials to negate the existence of an issue on which the non-moving party will bear the burden of proof at trial. *Celotex,* 477 U.S. at 323, 106 S. Ct. at 2553. *But cf., id.,* 477 U.S. at 328, 106 S.Ct. at 2555-56 (White, J., concurring).

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support his legal theory. *Commodity Futures Trading Comm'n v. Savage,* 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the movant's evidence at trial. *See T.W. Elec.,* 809 F.2d at 630. Similarly, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.* 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied,* 440 U.S. 981 (1979). Moreover, "if the factual context makes the nonmoving party's claim *implausible,* that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics,* 818 F.2d at 1468, *citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Insurance Co. of North America,* 815 F.2d 1285, 1289 (9th Cir. 1987), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2512 (1986). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Id.*

However, when "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the non-moving party with respect to that fact." *T.W. Elec.*, 809 F.2d at 631. Also, inferences from the facts must be drawn in the light most favorable to the non-moving party. *Id.* Inferences may be drawn both from underlying facts that are not in dispute, as well as from disputed facts which the judge is required to resolve in favor of the non-moving party. *Id.*

DISCUSSION

In a civil forfeiture proceeding, the government bears the burden of going forward, and must establish probable cause that the property subject to forfeiture is involved in criminal activity. *Id.* at 1216; *United States v. $5,644,540.00 in U.S. Currency,* 799 F.2d 1357, 1362 (9th Cir. 1986). Probable cause means the government must have reasonable grounds to believe the property subject to forfeiture is related to an illegal drug transaction, supported by less than prima facie proof, but more than mere suspicion. *Id.* at 1362. The government must rely on sufficiently reliable information to warrant a reasonable belief that the property is subject to forfeiture. *United States v. Dickerson,* 873 F.2d 1181, 1185 (9th Cir. 1988). The government need not link the seized property to a particular narcotics transaction. *United States v. Four Million, Two Hundred and Fifty-Five Thousand,* 762 F.2d 895, 905 (11th Cir. 1985). Additionally, the government need not show that the evidence relied upon to establish probable cause is admissible pursuant to Fed. R. Civ. P. 56(e). *United States v. One 56-Foot Yacht Named Tahuna,* 702 F.2d 1276, 1283 (9th Cir. 1983).

Once probable cause is established, the burden shifts to the claimant to prove by a preponderance of the evidence that the subject property is not forfeitable.[1] *United States v. $39,000.00 in Canadian Currency,* 801 F.2d 1210, 1215 (10th Cir. 1986). To accomplish this, the claimant may show either (1) that the property was not used for an unlawful purpose, or (2) that such use was without the claimant's knowledge or consent. *U.S. v. All Right, Title & Interest,* 901 F.2d 288, 291 (2d Cir. 1990).

Claimant Good argues that even if the government has met its initial burden of showing probable cause,[2] he is entitled to judgment as a matter of law for the following reasons: (1) the forfeiture was not commenced in the timely fashion, (2) the shifting burdens of proof scheme under

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[1] Although the government may rely on hearsay and other inadmissible evidence to satisfy its initial burden of showing probable cause, once the burden shifts, the government cannot rely on inadmissible evidence. *Tahuna, supra* at 1283-84; *United States v. Property Known as 6109 Grubb Road,* 886 F.2d 618, 622 (3d Cir. 1989) (government's use of inadmissible deposition testimony improperly used to rebut claimant's innocent owner defense although allowable to establish probable cause).

[2] Claimant does not admit that the government has met its probable cause showing. On the contrary, claimant argues that if this court grants his motion to exclude evidence which is set for hearing on September 17, 1990, then the government will not be able to meet its burden of showing probable cause, and the property will have to be released. The court therefore postpones its ruling on probable cause until September 17, 1990.

the civil forfeiture statutes is unconstitutional, (3) this forfeiture action violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, and (4) the lack of pre-seizure notice and a hearing in a civil forfeiture case violates the United States Constitution. For purposes of this motion, both claimant and the government agree that there are no disputed material issues of fact. Therefore, this court only concerns itself with the question whether claimant has demonstrated that he is entitled to judgment as a matter of law.

Timeliness of Filing this Civil Forfeiture Action

Claimant Good argues that the defendant property is not forfeitable because the government filed this forfeiture action in an untimely fashion, more than four years after the filing of criminal charges in state court against claimant, rather than promptly after charging claimant in the state court proceedings. The government argues that the applicable statute of limitations period is five years, and that therefore, this action was filed in a timely fashion. There is persuasive legal authority to support both positions.

Claimant does not dispute that there is a five-year statute of limitations period applicable to actions brought under 21 U.S.C. § 881(a)(7). Nonetheless, claimant argues that the government prosecuting a civil forfeiture action is still required to comply with the time constraints contained in 21 U.S.C. § 881(a)(7) and 19 U.S.C. § 1604, which may require commencement of the forfeiture action prior to the five year statute of limitations period.

Section 881(a)(7) of Title 21 of the United States Code provides for forfeiture of "[a]ll real property . . . *which is used, or intended to be used,* . . . to commit . . . a violation of this title . . ." Section 1604 of Title 19 requires the

Attorney General to immediately inquire into the facts of cases reported to him by customs officers, and "forthwith to cause the proper proceedings to be commenced and prosecuted, *without delay,* for . . . forfeiture . . ."

At least one judge on the Ninth Circuit Court of Appeals has interpreted section 881(a)(7)'s "used or intended to be used" language as requiring the initiation of the federal civil forfeiture action prior to termination of the state criminal proceeding. In *United States v. Tax Lot 1500,* 861 F.2d 232 (9th Cir. 1989), Judge Ferguson stated, in a short, one-page concurring opinion, that "federal forfeiture proceedings are timely commenced if initiated shortly after filing, but prior to termination, of state court criminal proceedings." *Id.* at 236.

The government argues that Judge Ferguson's concurrence should not be relied upon by this court in the instant case since the timeliness issue was not raised before the appellate court in the written briefs, but only in oral argument, and therefore, neither the government nor the Ninth Circuit had an adequate opportunity to brief this issue.

The government further argues that the applicable statute of limitations period is five years, and that since this action was commenced within four years of claimant Good's sentence, it was commenced in a timely fashion. Under 21 U.S.C. § 881(d), forfeiture proceedings under section 881 *et seq.* are governed by the procedures under the customs laws. Section 1621 of the customs statute provides:

> No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced *within five years after the time when the alleged offense was discovered* . . .

19 U.S.C. § 1621.

This action was filed on August 8, 1989. The search of the defendant property giving rise to the state criminal proceeding and providing the magistrate with probable cause to issue the seizure warrant in the present case occurred on January 31, 1985. Therefore, this civil forfeiture action was brought within the requisite five year statute of limitations period.

The court recognizes that the government has greatly inconvenienced claimant in commencing this forfeiture action four years after claimant was sentenced. However, since the applicable statute of limitations period is five years, the government has not violated the statute of limitations by commencing the forfeiture action four years after sentencing. Accordingly, the court rejects claimant's untimeliness argument on the ground that the filing of the forfeiture action was within the applicable statute of limitations period.

Constitutionality of the Allocations of Burdens

Claimant Good argues that the scheme of shifting burens of proof under the civil forfeiture statutes, 19 U.S.C. § 1615 and 21 U.S.C. § 881(a)(7), is unconstitutional. Claimant also argues that the government in a civil forfeiture action should be required to prove its case beyond a reasonable doubt just as it must in criminal proceedings. Claimant admits that the United States Supreme Court has never ruled directly on the constitutionality of this burden of proof allocation.

The Ninth Circuit Court of appeals has upheld the scheme of shifting burdens against constitutional challenge. *United States v. One 1970 Pontiac GTO,* 529 F.2d 65, 66 (9th Cir. 1976). In fact, the First, Fourth, and Ninth Circuits have all found that this burden of proof allocation is constitutional. *United States v. Santoro,* 866

F.2d 1538, 1544 (4th Cir. 1989); *United States v. $250,000.00 in U.S. Currency,* 808 F.2d 895, 900 (1st Cir. 1987). Additionally, the Tenth Circuit Court of Appeals has held that the absence of the reasonable doubts standard in the civil forfeiture process does not violate due process. *Bramble v. Richardson,* 498 F.2d 968, 973 (10th Cir. 1974).

Since the Ninth Circuit Court of Appeals has already ruled on this issue, upholding the shifting of burdens scheme against constitutional challenge, the court rejects claimant's argument that the allocation of burdens in civil forfeiture actions violates the United States Constitution.

Double Jeopardy

Claimant argues that the prosecution of this civil forfeiture action violates the double jeopardy clause of the fifth amendment to the United States Constitution. Claimant Good relies primarily on *United States v. Halper,* 109 S.Ct. 1892 (1989), a recent case in which the United States Supreme Court held that the double jeopardy clause prohibits the government from imposing a civil sanction after criminal punishment for the same conduct if the civil sanction in the subsequent proceeding "bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word.

The court explained that a civil sanction is punishment if it "may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 1902. The *Halper* court explained:

> [T]he government may not originally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole.

The court finds that the civil forfeiture statute at issue in this case was not intended to be punitive, but was intended to be remedial in nature. The legislative history of the civil forfeiture statutes suggests that the primary function of these statutes is to take away the instrumentalities necessary to execute drug crimes, a function that this court finds is remedial.

Additionally, the court finds this case markedly different from the *Halper* case. First, *Halper* was not a civil forfeiture action; it involved a false claims action. Second, *Halper* involved the same sovereign who was the prosecutor in the initial criminal prosecution, and also the plaintiff in the subsequent civil action. In this case, by contrast, the state of Hawaii was the first sovereign that prosecuted claimant in the state criminal proceeding. The United States government, a separate sovereign, has initiated the instant civil forfeiture action. Generally, double jeopardy does not attach when a person is criminally prosecuted by two diferent sovereigns even if the prosecution arises from the same set of facts. The same rule would appear to apply in this case.

The most important reason why this court is reluctant to find a double jeopardy violation is because of the enormous consequences such a ruling would have in the area of civil forfeiture law. If double jeopardy precludes civil forfeiture of a claimant's property after the claimant has been tried in a prior criminal proceeding, then most of the current civil forfeiture actions involving illegal drug activity would have to be dismissed. The court does not believe that Congress intended such a result when it passed the current civil forfeiture statutes. Accordingly, the court rejects claimant's double jeopardy argument.

Lack of a Pre-Seizure Hearing – Due Process

Claimant Good's final argument in support of his motion for summary judgment is that the lack of a pre-seizure in civil forfeiture cases violates the due process clause of the United States Constitution. Claimant Good relies on *United States v. Premises and Real Property at 4492 South Livonia Road,* 889 F.2d 1258 (2d Cir. 1989), a case in which the Second Circuit Court of Appeals held that 21 U.S.C. § 881(a)(7) was unconstitutional as applied when the government seized a person's home without giving the claimant the opportunity for a pre-seizure hearing.

The relevant case law appears to allow for seizure in civil forfeiture actions without pre-seizure notice and hearing. The Eighth and Ninth Circuit Courts of Appeals have held that due process does not require that pre-seizure notice and hearing be given in a civil forfeiture case. *United States v. One 1985 Cadillac Seville,* 866 F.2d 1142, 1147 (9th Cir. 1989); *United States v. One 1980 Red Ferrari,* 875 F.2d 186 (8th Cir. 1989). The court rejects claimant's due process challenge to the civil forfeiture statute.

As discussed above, claimant has filed to demonstrate that he is entitled to judgment as a matter of law. Accordingly, claimant's motion for summary judgment is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, Sept. 11, 1990.

/s/ Harold M. Fong

HARROLD M. FONG
United States District Judge

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law;

3. 21 U.S.C. 881 provides:

§ 881. Forfeitures

Subject property

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

> (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.
>
> (2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.
>
> (3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that –
>
> (A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter 11 of this chapter.
>
> (B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and
>
> (C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.
>
> (5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation

of a felony provision of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 857 of this title).

(11) Any firearm (as defined in section 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure

(b) Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunctino or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or

(4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

Custody of Attorney General

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this subchapter, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

Other laws and proceedings applicable

(d) The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as

are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

Disposition of forfeited property

(e)(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 1616a of Title 19, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited per-

sonal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to a country which, if applicable, has been certified under section 2291 (h) of Title 22.

(2)(A) The proceeds from any sale under subparagraph (B) of paragraph (1) and any moneys forfeited under this subchapter shall be used to pay—

(i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs; and

(ii) awards of up to $100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent.

Any award paid for information concerning the killing or kidnapping of a Federal drug law enforcement agent, as provided in clause (ii), shall be paid at the discretion of the Attorney General.

(B) The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of Title 28, any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A) except that, with respect to forfeitures conducted by the

Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of Title 39, such moneys and proceeds.

(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A)—

(A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

(B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.

Forfeiture and destruction of schedule I or II substances

(f)(1) All controlled substances in schedule I or II that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) of this section which cannot be separated safely from such raw materials or products shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I or II, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this subchapter, all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) of this section which cannot be separated safely from such raw materials or products under such circumstances as the Attorney General may deem necessary.

Plants

(g)(1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

Vesting of title in United States

(h) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

Stay of civil forfeiture proceedings

(i) The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter, or a violation of State or local law that could have been charged under this subchapter or subchapter II of this chapter, which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

Venue

(j) In addition to the venue provided for in section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

Agreement between Attorney General and Postal Service for performance of functions

(*l*)[1] The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

4. 19 U.S.C. 1600-1610 and 1621 provide:

§ 1600. Application of the customs laws to other seizures by customs officers

The procedures set forth in sections 1602 through 1619[3] of this title shal apply to seizures of any property effected by customs officers under any law enforced or administered by the Customs Service unless such law specifies different procedures.

§ 1601, 1601a. Repealed. June 25, 1948, ch. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948

§ 1602. Seizure; report to customs officer

It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the appropriate customs officer for the district in which such violation occurred, and to turn over and deliver to such customs officer any vessel, vehicle, aircraft, merchandise, or baggage seized by him, and to report immediately to such customs officer every violation of the customs laws.

§ 1603. Seizure; warrants and reports

(a) Any property which is subject to forfeiture to the United States for violation of the customs laws and which is not subject to search and seizure in accordance with the provisions of section 1595 of this title, may be seized by the appropriate officer or person upon process issued in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure. This authority is in addition to any seizure authority otherwise provided by law.

(b) Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs laws is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the

names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

§ 1604. Seizure; prosecution

It shall be the duty of the Attorney General of the United States immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court or the Court of International Trade is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless, upon inquiry and examination, the Attorney General decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises.

§ 1605. Seizure; custody; storage

All vessels, vehicles, aircraft, merchandise, and baggage seized under the provisions of the customs laws, or laws relating to the navigation, registering, enrolling or licensing, or entry or clearance, of vessels, unless otherwise provided by law, shall be placed and remain in the custody of the appropriate customs officer for the district in which the seizure was made to await disposition according to law.

Pending such disposition, the property shall be stored in such place as, in the customs officer's opinion, is most convenient and appropriate with due

regard to the expense involved, whether or not the place of storage is within the judicial district or the customs collection district in which the property was seized; and storage of the property outside the judicial district or customs collection district in which it was seized shall in no way affect the jurisdiction of the court which would otherwise have jurisdiction over such property.

§ 1606. Seizure; appraisement

The appropriate customs officer shall determine the domestic value, at the time and place of appraisement, of any vessel, vehicle, aircraft, merchandise, or baggage seized under the customs laws.

§ 1607. Seizure; value $100,000 or less, prohibited merchandise, transporting conveyances

(a) If–

(1) the value of such seized vessel, vehicle, aircraft, merchandise, or baggage does not exceed $100,000;

(2) such seized merchandise is merchandise the importation of which is prohibited; or

(3) such seized vessel, vehicle, or aircraft was used to import, export, transport, or store any controlled substance;

the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.

(b) As used in this section, the term "controlled substance" has the meaning given that term in section 802 of title 21.

§ 1608. Seizure; claims; judicial condemnation

Any person claiming such vessel, vehicle, aircraft, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $5,000 or 10 percent of the value of the claimed property, whichever is lower, but not less than $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

§ 1609. Seizure; summary forfeiture and sale

(a) In general

If no such claim is filed or bond given within the twenty days hereinbefore specified, the appropriate customs officer shall declare the vessel, vehicle, aircraft, merchandise, or baggage forfeited, and shall sell the same at public auction in the same manner as merchandise abandoned to the United States is sold or otherwise dispose of the same according to law, and shall deposit the proceeds of sale, after deducting the expenses described in section 1613 of this title, into the Customs Forfeiture Fund.

(b) Effect

A declaration of forfeiture under this section shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States. Title shall be deemed to vest in the United States free and clear of any liens or encumbrances (except for first preferred ship mortgages pursuant to section 961 of title 46, Appendix, or any corresponding revision, consolidation, and enactment of such subsection in title 46) from the date of the act for which the forfeiture was incurred. Officials of the various States, insular possessions, territories, and commonwealths of the United States shall, upon application of the appropriate customs officer accompanied by a certified copy of the declaration of forfeiture, remove any recorded liens or encumbrances which apply to such property and issue or reissue the necessary certificates of title, registration certificates, or similar documents to the United States or to any transferee of the United States.

§ 1610. Seizure; judicial forfeiture proceedings

If any vessel, vehicle, aircraft, merchandise, or baggage is not subject to section 1607 of this title, the appropriate customs officer shall transmit a report of the case, with the names of available witnesses, to the United States attorney for the district in which the seizure was made for the institution of the proper proceedings for the condemnation of such property.

* * * * *

§ 1621. Limitation of actions

No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs

~~customs~~ laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered: *Provided,* That in the case of an alleged violation of section 1592 of this title arising out of gross negligence or negligence, such suit or action shall not be instituted more than five years after the date the alleged violation was committed: *Provided further,* That the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation.

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No. 92-1180

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Due Process Clause require the government to give a homeowner an opportunity for a hearing before seizing a home, when there are no special circumstances which make immediate seizure necessary?

2. Is the civil forfeiture of a home and real property under 21 U.S.C. § 881(a)(7) untimely where, although the governing statutes require forfeitures to be commenced "forthwith" and "without delay" after discovery of the offense, the government waited four and a half years after the seizure of marijuana on the premises, and four years after the owner's conviction in state criminal court, to commence forfeiture?

PARTIES TO THE PROCEEDINGS

The petitioner in this action is the United States of America. The respondent is James Daniel Good, who filed a claim to the defendant real property *res* in the proceedings below.

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No. 92-1180

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

James Daniel Good, by and through his undersigned counsel, respectfully submits this brief in opposition to the petition for a writ of certiorari filed by petitioner United States of America.

OPINIONS BELOW

The opinion of the court of appeals, as amended on denial of rehearing, is reported at 971 F.2d 1376. It was reproduced in the Appendix to the petition for a writ of certiorari. The opinions of the district court are not

reported. They were reproduced in the Appendix to the petition for a writ of certiorari.

JURISDICTION

Respondent adopts petitioner's statement of jurisdiction.

STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution, the Due Process Clause of the Fifth Amendment, 21 U.S.C. § 881, and 19 U.S.C. §§ 1600-1610 and § 1621 were reproduced in the Appendix of the petition for a writ of certiorari.

STATEMENT

On January 31, 1985, local police, accompanied by an IRS agent, searched the home and real property of claimant James Daniel Good ("Good"), pursuant to a search warrant. They discovered eighty-nine pounds of bulk marijuana, marijuana seeds, and a small amount of hashish oil. (CR 1; CR 29, pp. 51-54, pp. 56-58.)

Good was charged with promoting a harmful drug in the second degree in a criminal complaint issued in state court on June 4, 1985. (CR 29, p. 48.) He pleaded guilty on July 3, 1985, and was pronounced guilty and sentenced on August 7, 1985. (CR 33, p. 76.)

Good was placed on probation and ordered to serve one year in jail. (CR 29, pp. 49-50.) He was also ordered to surrender $3,187 in cash found on the premises in a state court civil forfeiture proceeding. (CR 45, pp. 37-38.)

By August, 1989, Good had served his jail time, had completed all of the special terms of his probation, and had been performing satisfactorily in his probation. (CR 29, pp. 35-36.)

However, on August 8, 1989, four years and six months after the original search, the United States filed a complaint for forfeiture against Good's property. (CR 1.) A Warrant for Arrest of the property was signed by the clerk of the United States District Court on August 8, 1989. (CR 1.) United States marshals seized the property on August 21, 1989. (CR 4.)

The government did not give Good prior notice or an opportunity for a hearing before seizing the home.

At the time of the arrest of the property, it was being leased by Good to tenants. (CR 29, p. 33.) The government allowed the tenants to remain in possession after it searched the home and inventoried the contents, but further rental payments were made to the government. (*Id.*) The government was willing to allow Good to resume occupancy of the property as substitute custodian, but he was unable to do so because of his commitment to return to work abroad for a charitable organization. (*Id.*)

The government has never offered any explanation for the four and one-half year delay between the search of

Good's home and the institution of forfeiture proceedings. The record does not reveal when federal officials responsible for initiating the forfeiture first actually learned of the search and seizure on Good's property because the government refused to answer interrogatories on this issue. *United States v. James Daniel Good Property*, 971 F.2d 1376, 1382 (9th Cir. 1992).

In the district court, Good argued that the forfeiture was not timely filed; that the forfeiture violated the Double Jeopardy Clause as a double punishment; and that he should have been given the opportunity for a hearing before the seizure. (CR 29; CR 37; CR 39; CR 50.) He also argued that the initial search warrant had been invalid because the affidavit upon which the warrant was based did not specify the time frame within which the alleged illegal activities had been observed. (CR 30; CR 46.)

The district court rejected all of Good's contentions. After finding that there was probable cause for forfeiture, it ordered the property to be forfeited to the United States. (CR 52; CR 53.)

The Ninth Circuit Court of Appeals reversed and remanded to the district court. It held that 19 U.S.C. §§ 1602-1604 require federal officials to act promptly upon learning of grounds for forfeiture, but that the record was inadequate to determine when federal officials authorized to seize property (DEA or FBI) had learned of the search and seizure. The court remanded the case to the district court to develop the factual record on this issue. The court of appeals ruled that if the government, on remand, showed its action was timely, summary judgment should be entered against Good.

The court also held that the Due Process Clause of the Fifth Amendment requires the government to give a homeowner an opportunity for a hearing before the seizure of the home, unless there were exigent circumstances, which were not present in Good's case.

The court applied the factors identified by this court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and concluded that, under the particular circumstances presented in this case, the government had not justified the *ex parte* seizure of Good's property. The court distinguished cases involving the seizure of movable property because Good's home could not be easily moved. The court noted that an owner can be prevented from transferring or encumbering real property through less intrusive means than *ex parte* seizure, such as a *lis pendens*, a restraining order, or a bond requirement. Moreover, the unexplained four and one-half year delay undercut the government's assertion that a quick seizure was necessary. Nonetheless, the court ruled that the failure to provide the hearing did not invalidate the forfeiture. It only entitled Good to recovery of rents collected by the government as a result of the *ex parte* seizure.

SUMMARY OF REASONS FOR DENYING THE WRIT

A. Summary of Argument

The government has asked this court to grant a writ of certiorari on two issues: the requirement of a hearing before seizure and the "promptness" requirement of 19 U.S.C. §§ 1602-1604.

The court should not grant certiorari on either issue.

The court of appeals correctly ruled that a pre-seizure hearing should have been held. It followed the guidelines announced by previous Supreme Court decisions, and properly distinguished cases which allowed seizures without prior hearings because the *res* could be moved, or hidden, or in which a hearing was otherwise impractical. The government could not demonstrate any need for immediate seizure without notice when it waited more than four years to institute proceedings. Transfer of the property could have been prevented through less intrusive means. Four circuits have now issued decisions requiring hearings before the seizure of residences; the only circuit court decision cited by the government as conflicting is factually distinguishable and contained no real analysis.

The court of appeals also correctly interpreted 19 U.S.C. §§ 1602-1604, and its interpretation will have positive policy results in the administration of forfeiture law. The Good case involved unusual facts – an unexplained four and one-half year delay. Because of these peculiar facts, this case does not present an issue of recurring significance that warrants consideration by this court. In addition, there is no conflict among the courts of appeal on this issue, and no conflict with prior decisions of this court.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' Conclusion that the Owner of a Home Must Be Given a Hearing Before Its Seizure By the Government, Unless there are Extraordinary Circumstances, Is Consistent with the Decisions of this Court and Does Not Warrant Review.

This court has consistently held that due process requires that a property owner be given notice and an opportunity to be heard before the government deprives the owner of a significant property interest. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Fuentes v. Shevin*, 407 U.S. 76, 80-82 (1972). There is an exception: the government may act before notice and hearing under "extraordinary circumstances." *Fuentes v. Shevin*, 407 U.S. at 91; *United States v. $8850*, 461 U.S. 555, 562 n. 12 (1983).

This court set out a general test to determine whether a pre-deprivation hearing may be avoided in *Mathews v. Eldridge*. Under the *Mathews v. Eldridge* test, a court must consider (1) the significance of the property interest at stake; (2) the risk of erroneous deprivation given the procedures actually used, as well as the probable value of additional safeguards; and (3) the government's interest in pre-notice seizure. *Mathews v. Eldridge*, 424 U.S. at 335.

In Good's case, the Ninth Circuit followed the *Mathews v. Eldridge* analysis in holding that the circumstances did not permit a departure from the ordinary rule requiring a pre-deprivation hearing. The Ninth Circuit's opinion closely tracked an earlier decision of the Second Circuit, *United States v. Property at 4492 South Livonia Road*, 889 F.2d 1258 (2d Cir. 1989).

First, Good's interest in his home is traditionally one of the property interests most respected by the law. *4492 South Livonia Road*, 889 F.2d at 1264; *United States v. Karo*, 468 U.S. 705, 714 (1984). The actions of the government in entering Good's property, attaching a warrant of arrest to it, taking physical control and possession of the property, and collecting the rents, constituted a significant deprivation of Good's rights. Although the government allowed Good's tenants to remain, this was only as an act of grace on the part of the government: the government did not recognize a right of the tenants to remain, or any right of Good to control the tenants. See *4492 South Livonia Road* at 1265. Good lost his right as lessor to make sure that the property was used in accordance with the terms of the lease. He lost his rights to receive the rents, to terminate the lease in case of breach, to inspect the property, and to re-enter upon the end of the lease term. The seizure also affected, and perhaps breached, Good's obligation to allow his tenants the "quiet enjoyment" of the property. In short, the seizure deprived Good of all rights of ownership. In *Connecticut v. Doehr*, ___ U.S. ___, 115 L.Ed.2d 1, 14, 111 S.Ct. 2105, 2113 (1991), the court recognized that even an attachment of real property is a significant deprivation of a property right. Good suffered a far more severe deprivation when his property was seized.

The government offered no compelling justification for not affording a hearing before the seizure of the home. As the Ninth Circuit noted, "[T]he house is not going anywhere." 971 F.2d at 1384. The government could have prevented transfer or encumbrance through far less restrictive means: a *lis pendens*, restraining order, or a bond. *Id.*; *4492 South Livonia Road* at 1265.

The government obviously was not concerned that the home was the scene of an active drug operation: it waited four and one-half years to move against the property, then let Good's tenants remain. *United States v. James Daniel Good Property* at 1384; *4492 South Livonia Road* at 1265. The government cannot justify a seizure without a hearing by pointing to the policy of using forfeitures to fight drug crimes: that objective can be achieved equally well by seizure *after* a hearing. *4492 South Livonia Road* at 1265.

In its petition for certiorari, the government offers these practical arguments against a hearing: (1) the owner could destroy or damage the property if there were advance warning, (2) seizing agents might be in danger if the owner were tipped off in advance, and (3) the owner might use the hearing to obtain discovery. None of these arguments applies to the facts of this case.

The government had no real concern about a physical threat to Good's property. It allowed Good's tenants to remain and would have allowed Good to resume residence under an occupancy agreement. Good had no desire to harm his property – he has been trying his best to get it back. In any case, it would not necessarily be easier for the owner to damage the property before seizure than after. The government typically does not post U.S. marshals on a round-the-clock watch over seized real property.

The government's second scenario – that a disgruntled owner might shoot it out with seizing agents – is farfetched. It is possible that an owner would resist a seizure, whether it occurs with or without warning. It would

be a most irrational decision for a property owner to match firepower against the United States in defense of the property, but it seems less likely that the owner would make a rash decision *after* a judicial hearing, when the owner has had time to reflect upon the likely consequences and outcome of armed resistance, than it would in the typical seizure, where agents suddenly show up in an attempt to take over the property. Prior notice would eliminate the possibility that an occupant of property might react violently after mistaking an official seizure for a criminal action. In addition, the government had no reason to expect violent resistance from Good, who had pleaded guilty, served his sentence, and was completing probation.

The discovery issue is one that can easily be controlled by a court. In Good's case, civil discovery could not prejudice the government's position in criminal proceedings because Good had pleaded guilty four years earlier. Nothing in the Ninth Circuit's opinion suggests that the government would be required to produce more information at a pre-seizure hearing than a claimant would otherwise be able to obtain in discovery.

The government's petition for certiorari in effect urges the court to create a forfeiture exception to the normal requirements of due process. This court has never created such a blanket exception. It has allowed seizures without a hearing when the property involved was a boat, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), or cash, *United States v. $8850*. The distinction between these cases and the forfeiture of real property is obvious, and was noted by the courts in *United States v. James Daniel Good Property*, and *4492 South Livonia Road*. In

other forfeiture cases where the Supreme Court has allowed seizure of the *res* without a hearing, the *res* was easily moved or hidden. *United States v. James Daniel Good Property* at 1383-1384; *4492 South Livonia Road* at 1265. The *Pearson Yacht* court expressly mentioned the mobility of the yacht as a factor in allowing seizure before a hearing: "[T]he property seized – as here, a yacht – will often be the sort that would be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." 416 U.S. at 679.

Both *Pearson Yacht* and *United States v. $8850* were decided before 21 U.S.C. § 881(a)(7) was enacted in 1984, which made real property forfeitable for the first time. *United States v. James Daniel Good Property* at 1383. The Supreme Court could scarcely have anticipated when writing opinions such as *Pearson Yacht* and *$8850* that they would be used to justify seizure of real property without a hearing.

It would be an extraordinary departure from this court's prior due process jurisprudence to hold that a seizure of real property may occur without a prior hearing, regardless of the circumstances.

The opportunity for a hearing is also important to prevent an erroneous deprivation of property. Without the hearing, the owner has no chance to present defenses prior to the seizure, such as innocent ownership, and cannot challenge or test the quality of the government's proof.

The government's petition for certiorari argues (at 11) that the Fourth Amendment ". . . rather than the Fifth Amendment's Due Process Clause, should be the point of reference in determining the lawfulness of a seizure in

the forfeiture context." This assertion is at odds with settled law: the Supreme Court has already applied the due process clause in forfeiture cases. *Pearson Yacht; United States v. $8850.*

Four circuits have issued opinions that the seizure of real property without prior notice and a hearing violated the Due Process Clause unless there are exigent circumstances. *4492 South Livonia Road; United States v. James Daniel Good Property; United States v. A Parcel of Land, Appurtenances, and Improvements, known as 92 Buena Vista Ave.*, 937 F.2d 98, 101 (3d Cir. 1991); (*cert. granted* on other issues No. 91-781); *Richmond Tenants Organization v. Kemp*, 956 F.2d 1300, 1307-1308 (4th Cir. 1992) (due process clause requires notice and hearing before eviction of public housing tenants suspected of drug activities, unless there are exigent circumstances.)

The petition for a writ of certiorari cites only one circuit court decision holding that a pre-seizure hearing is *not* needed when a house is seized. *United States v. A Single Family Residence at 900 Rio Vista Blvd.*, 803 F.2d 625, 631-32 (1986). The Ninth Circuit characterized the analysis in *900 Rio Vista Blvd.* as "cursory." 971 F.2d at 1384. This is a fair assessment. The *900 Rio Vista Blvd.* court simply cited *Pearson Yacht* and *United States v. $8850*, without further analysis, deciding (in one paragraph) that a corporate claimant was not entitled to a hearing before the seizure of the house. The corporate claimant held bare legal title to the property; the court expressly stated that the claimant was a front and "strawman" for the beneficial owner, who did not make a claim. 803 F.2d at 629, 631. Therefore, the *900 Rio Vista Blvd.* court did not have occasion to analyze the competing interests involved

when a homeowner challenges the *ex parte* seizure of property.

While the *900 Rio Vista Blvd.* opinion states that a residence was involved, it does not indicate whether anyone actually resided on the property at the time of seizure, whether the corporate claimant leased the property, or anything else about the claimant's relationship to the property at the time of seizure other than its claim to hold legal title. *Cf. United States v. A Leasehold Interest In Property Located at 850 S. Maple*, 789 F.Supp. 1385, 1391-1392 (E.D. Mich. 1992), distinguishing *900 Rio Vista Blvd.* from the eviction of public housing tenants on the grounds, *inter alia*, that it involved a corporate claimant.

In short, the conflict between circuits is not substantial; the cases can be distinguished on their facts.

The general issue of pre-seizure hearings is still undergoing further doctrinal development in the circuit courts. For example, the Second Circuit has held that when many units in an apartment building were actively being used for drug transactions, with the owner's apparent consent, extraordinary circumstances existed which justified seizure without a hearing, to prevent further use of the building as an instrumentality of crime. *United States v. 141st Street Corp.*, 911 F.2d 870, 874-876 (1990), *cert. den.* 111 S.Ct. 1017 (1991).[1]

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[1] The petition for certiorari mistakenly characterizes this decision as based on the property's status as a rental. In fact, the ongoing drug activity was the decisive factor for the court in distinguishing *4492 South Livonia Rd.*; the *United States v. 141st Street Corp.* court recognized that the seizure of a rental building

The courts of appeals will be able to adopt the general due process rules previously expounded by this court to cover the shifting factual circumstances of real property seizures.

II. Whether 19 U.S.C. §§ 1602-1604 Precludes Forfeiture After Unreasonable Delay Does Not Warrant Review By This Court.

The Ninth Circuit also correctly applied 19 U.S.C. §§ 1602-1604 to hold that if the government had unduly delayed in instituting forfeiture, the action must be dismissed.

This is solely an issue of statutory construction. No court has previously discussed the time limitations created by 19 U.S.C. §§ 1602-1604. *James Daniel Good Property* at 1379-1380.

The petition for a writ of certiorari argues that the *Good* decision squarely conflicts with *United States v. $8850*, specifically with footnote 13, (461 U.S. at 563, n.13). There is, in fact, no conflict because a key statute construed by the Ninth Circuit in *Good* – 19 U.S.C. § 1603 – was amended to require prompt reporting *after* the events considered by the court in *$8850*.

In *$8850*, the cash was seized in September, 1975, and judicial forfeiture was commenced in March, 1977. As the *$8850* court itself noted, at the time of the seizure:

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was "a deprivation of a significant property interest," 911 F.2d at 875-876, but held it was justified by the ongoing drug activity. *Id.*

> "19 U.S.C. § 1603 contained no requirement of a prompt report of a seizure by the Customs Service to the United States Attorney for purposes of instituting forfeiture proceedings. As amended in 1978, § 1603 now requires the appropriate customs officer 'to report promptly' to the United States Attorney whenever legal proceedings in connection with such seizure or discovery are required." 461 U.S. at 558, n. 3.

The *$8850* court therefore did not consider or decide the significance of the prompt reporting requirement of § 1603.[2]

In addition, the *$8850* court did not expressly discuss the effect of the various provisions of 19 U.S.C. §§ 1602-1604 requiring prompt governmental action even as they existed at that time.

No direct conflict exists in the courts of appeal on this issue. In *United States v. A Parcel of Land, Appurtenances, and Improvements, known as 92 Buena Vista Ave.*, the Third Circuit stated that an action begun in 1989 for predicate acts discovered in 1986 was timely. The Third Circuit did not discuss or even mention 19 U.S.C.

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[2] The petition for a writ of certiorari claims that the Ninth Circuit had, in *United States v. Two Hundred Ninety-five Ivory Carvings*, 726 F.2d 529, 531 (9th Cir. 1984), "previously recognized . . . that those statutory provisions impose no enforceable standards independent of the Due Process Clause." The government again fails to note that § 1603 was amended to require prompt reporting *after* the seizure and delays complained of in *Two Hundred Ninety-five Ivory Carvings*, and that the court, in the same clause cited by the government, stated that its opinion was limited to "the time of these proceedings." 726 F.2d at 531.

§§ 1602-1604. One cannot find a conflict among circuits when only one circuit has directly addressed an issue.[3]

The decision of the Ninth Circuit is also correct on the merits. The statutory requirements are clear.

First, § 1602 requires that officials responsible for the enforcement of forfeiture laws "report immediately. . . every violation."

Second, § 1603 requires that when a violation is discovered, the customs officers shall "report promptly such seizure or violation to the United States attorney."

Third, § 1604 requires the Attorney General "immediately to inquire" into the facts reported, and "forthwith to cause the proper proceedings to be commenced and prosecuted, without delay . . ."[4]

There can be no doubt over the meaning of these provisions. The government must strictly comply with every provision of the forfeiture laws. *United States v. $38,000 in U.S. Currency*, 816 F.2d 1538, 1545-47 (11th Cir. 1987). As the Eleventh Circuit has held, ". . . strict compliance with the letter of the law by those seeking forfeiture must be required." *United States v. Property at 4880 S.E. Dixie Highway*, 838 F.2d 1558, 1564 (11th Cir. 1988).

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[3] In *United States v. Land & Bldg. at 2 Burditt St.*, 924 F.2d 383, 385 (1st Cir. 1991) the court in *dicta* stated that it doubted that the government was free to initiate forfeiture at any time it chose before the five-year statute of limitations.

[4] The clause in § 1604 requiring the government's attorneys to commence proceedings forthwith when court proceedings are "necessary" refers to the fact that court proceedings are necessary to forfeit property under circumstances when administrative forfeiture is not available. At the time forfeiture was initiated on Good's property, administrative forfeitures could not be used for property, such as Good's, worth more than $100,000, 19 U.S.C. § 1607, § 1610, so court proceedings were necessary.

In *Geppi v. State*, 270 Md. 239, 310 A.2d 768 (Md.App. 1973) the court construed a state forfeiture statute to require dismissal of an untimely forfeiture. The statute at issue provided that when property had been seized which is subject to forfeiture, "proceedings . . . shall be instituted promptly." The statute did not specify a more definite time frame. The court held that an unexplained delay of eight months and eight days was too long to comply with the statutory promptness requirement, and ordered that the seized property be returned to the claimant. 310 A.2d at 772.

Dismissal is the appropriate remedy for non-compliance with statutory time requirements in a forfeiture case. *State v. One 1980 Harley Davidson*, 57 Md.App. 178, 469 A.2d 487, 490-491 (Md.App. 1984); *Geppi v. State; State v. Ellis*, 156 Ga.App. 779, 275 S.E.2d 361 (Ga.App. 1980).

Forfeiture is a harsh sanction, not favored by the law. *United States v. $48,595*, 705 F.2d 909, 914 (7th Cir. 1983); *United States v. One 1957 Rockwell Aero Commander*, 671 F.2d 414, 417 (10th Cir. 1982). Forfeiture statutes must be strictly construed against forfeiture. *United States v. $38,000 in U.S. Currency*. A forfeiture should be allowed "only when within both [the] letter and spirit of the law." *United States v. One 1936 Model Ford V-8 Deluxe Coach*, 307 U.S. 219 (1939).

The *James Daniel Good Property* court also considered, but rejected, an alternative basis for holding the forfeiture

untimely: the concurring opinion in *United States v. Tax Lot 1500*, 861 F.2d 232, 236 (9th Cir. 1989) (Ferguson, J. concurring), which construed 21 U.S.C. § 881(a)(7) as requiring federal drug forfeiture proceedings for real property to be commenced before the termination of state court criminal proceedings, because forfeiture is only available when the property is "used, or intended to be used" for criminal drug activities near the time of forfeiture. *Id.*

The government has not claimed that Mr. Good's property was "used, or intended to be used" to commit a felony violation of Title 21 at any time after January 31, 1985. Under the concurring opinion in *Tax Lot 1500*, the property was no longer subject to forfeiture when forfeiture was commenced.

If this court grants certiorari, it may affirm on any ground for which there is support in the record. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979). The concurring opinion of *Tax Lot 1500* provides such an alternative ground.

The requirement that the government promptly institute forfeiture actions is good public policy. Seizure and forfeiture are most effective in preventing the continued use of property to commit crimes, or in depriving criminals of financial assets used to commit crimes, if the property is promptly seized and forfeiture proceedings promptly commenced.

Owners of property used in drug crimes would have less time to convert the property to less traceable assets through sale or mortgage. The government's resources would be channeled toward stripping assets from active

law-breakers, rather than from those, like Good, who have completed the rehabilitation process, and become law-abiding citizens. The government would direct its attention to current violators, and not to stale cases like Mr. Good's.

The punitive character of forfeitures cannot be denied. In Good's case, the government is seizing property allegedly used in the commission of a crime more than four and one-half years after the offense, when the individual involved had nearly completed probation. It is in society's interest in promoting the rehabilitation of offenders to make clear the penalties which they must face, so that the offender may discharge his obligations, and go on to a productive life. The government has made a "late hit" on Mr. Good, who must have believed that he had already received his punishment.

The possibility that the government might delay for years after the termination of criminal proceedings before seizing property, can only discourage an owner from investing in the improvement of the property, and may thus blight the property for years. Properties may simply fester.

The only practical objection raised by the government to the interpretation of 19 U.S.C. §§ 1602-1604 adopted in the *Good* decision is that it "would create incentives to investigate possible violations of the law with undue haste." Petition for certiorari at 21. The Ninth Circuit's decision does not require the government to act with undue haste. The court remanded the case to the district court to develop the factual record to determine

whether the government's actions were untimely. There is no reason to think that the district court and circuit court will be unable to scrutinize the factual record in this and other cases to determine whether or not the government acted with due promptness.

In this case, the government waited four and one-half years after the discovery of the offense to begin forfeiture proceedings, for no apparent reason. It is to be hoped that this sort of unexplained delay will rarely occur. The most obvious possible reason – the pendency of criminal proceedings or investigations – cannot possibly apply to Good's case. Criminal proceedings were concluded in August, 1985.[5]

The court of appeals' interpretation of 19 U.S.C. §§ 1602-1604 therefore presents none of the justifications for a writ of certiorari enumerated in Rule 10.1 of the Rules of the Supreme Court. There is no conflict with any other circuit court decision, or any departure from "the accepted and universal course of judicial proceedings." Sup.Ct.R. 10.1(a). It does not involve "an important question of federal law . . . which should be settled by this Court." Sup.Ct.R. 10.1(c). Rather, it involves the straightforward application of a clear statute to egregious and unusual facts. Finally, it is possible that the decision of the court of appeals will not affect the outcome of the case: on remand, the government may still prevail if it demonstrates that it acted promptly after learning of the grounds for forfeiture.

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[5] The government may file, then stay, the civil forfeiture action if the pendency of the criminal action creates discovery problems. *United States v. James Daniel Good Property* at 1382.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED this 19th day of February, 1993.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
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BEST AVAILABLE COPY

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1180

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

We have explained in the petition that the Ninth Circuit seriously erred in holding that the Due Process Clause required prior notice and an opportunity for a hearing before the premises at issue here could be seized for civil forfeiture, even though the seizure was made pursuant to a warrant issued by a neutral and detached magistrate. The Ninth Circuit likewise erred in holding that 19 U.S.C. 1602-1604 confer a right on a claimant to have a forfeiture action dismissed—even if it is brought within the five-year limitations period in 19 U.S.C. 1621—if government officials did not act with what the court regards to be sufficient haste in carrying out internal reporting and suit-filing duties. Both of those holdings warrant review by this Court.

1. a. Respondent's attempt (Br. in Opp. 12-13) to minimize the circuit conflict on the due process issue is without merit. The court of appeals specifically acknowledged that circuit conflict, pointing out that the Eleventh Circuit had reached the "opposite conclusion" in *United States* v. *A Single Family Residence*, 803 F.2d 625, 631-632 (1986). Pet. App. 15a; see also *United States* v. *Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1264 (2d Cir. 1989) (acknowledging contrary holding in *A Single Family Residence*). Although respondent tries to distinguish *A Single Family Residence* on the ground that the house there was owned by a corporation, the Eleventh Circuit did not rely on (or even mention) that fact in its due process discussion. Instead, the Eleventh Circuit correctly stated a categorical rule that due process does not require prior notice and opportunity for a hearing when property is seized for forfeiture. See 803 F.2d at 631-632; accord *United States* v. *Property Located at 4880 S.E. Dixie Highway*, 838 F.2d 1558, 1561-1562 (11th Cir. 1988) (reiterating holding of *A Single Family Residence* without attaching significance to nature of property or owner). Although respondent relies in this case on claimant Good's interest in his "home," Good was not residing on the forfeited premises when they were seized; he had leased the premises to tenants. His interest as lessor was no different from that of the corporate owner in *A Single Family Residence*.

b. Respondent ignores the fact that the court of appeals has essentially held unconstitutional the Act of Congress that authorizes seizures of property subject to forfeiture pursuant to a warrant issued "in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure," 21 U.S.C. 881(b)—*i.e.*, based on a magistrate's ex parte finding of probable cause. See Fed. R. Crim. P. 41. A holding that an Act of

Congress is unconstitutional is particularly worthy of review by this Court.

c. Respondent's attempt (Br. in Opp. 7-11) to defend the Ninth Circuit's due process ruling on the merits is unavailing. Respondent principally relies (Br. in Opp. 7-9) on *Fuentes* v. *Shevin*, 407 U.S. 67, 80-82 (1972), and the three-part test of *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), in arguing that a finding of probable cause by a magistrate is insufficient and that due process requires prior notice and opportunity for an adversary hearing before real property (or at least a residence) is seized. That argument overlooks the fact that this Court has already held that "seizure for purposes of forfeiture is one of those '"extraordinary situations" that justify postponing notice and opportunity for a hearing.'" *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 677 (1974) (quoting *Fuentes* v. *Shevin*, 407 U.S. at 90). Here, as in *Calero-Toledo*, seizure furnishes a basis for the government "to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions." 416 U.S. at 679 (footnote omitted); see also *Republic National Bank* v. *United States*, 113 S. Ct. 554, 557 (1992). Moreover, "unlike the situation in *Fuentes*, seizure is not initiated by self-interested private parties; rather, [government] officials determine whether seizure is appropriate under the provisions of the [federal] statutes." 416 U.S. at 679.[1]

---

[1] These factors also distinguish *Connecticut* v. *Doehr*, 111 S. Ct. 2105 (1991), on which respondent relies (Br. in Opp. 8). Moreover, unlike in *Doehr*, where the plaintiff had no interest in the real estate when he sought the attachment (see 111 S. Ct. at 2115), the United States here had an interest in the property itself as a result of Good's use of it to commit a drug offense.

Respondent seeks to distinguish *Calero-Toledo* on the ground that the property there was moveable, while here it was not. See Br. in Opp. 10-11. In *Calero-Toledo*, however, the Court simply identified, as the third of the three relevant factors, that "preseizure notice and hearing might frustrate the interests served by the [forfeiture] statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." 416 U.S. at 679. The Court did not suggest that it was necessary to show that the property would be removed in order to justify seizure without prior notice and hearing; it simply observed that property subject to forfeiture "will often be of a sort" that raises those concerns. The Court thus stated a categorical rule, based on the characteristics of forfeited property generally. Moreover, the Court in *Calero-Toledo* referred not only to the possibility of removal of the property, but also to the possibility that the property could be "destroyed" or "concealed." Those risks are present here, because a residence can be "destroyed," and its contents (which may also be subject to forfeiture if used in a drug transaction) can be "concealed."

Finally, claimant Good was not personally ousted from possession of the premises when they were seized; he had leased the premises to others and resided elsewhere. Nor were the tenants evicted; as respondent concedes (Br. in Opp. 3), they were permitted to remain under an occupancy agreement. Compare *United States* v. *A Parcel of Land, Building, Appurtenances, and Improvements, Known as 92 Buena Vista Avenue*, No. 91-781 (Feb. 24, 1993), slip op. 2 n.3 (plurality opinion of Justice Stevens). Given the limited nature of the deprivation, it was especially inappropriate for the court

of appeals to impose a prior notice and hearing requirement.

2. Respondent likewise fails in his defense of the court of appeals' holding that 19 U.S.C. 1602-1604 confer a right on a claimant to have a forfeiture action dismissed if it is not, in the court's view, instituted "promptly." The relevant statute of limitations, 19 U.S.C. 1621, specifically provides that "[n]o suit or action to recover any pecuniary penalty or forfeiture * * * shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered." Section 1621 plainly *does* confer a right on a claimant to have a suit dismissed if it is filed outside the five-year period, because the statute specifically provides that no such suit may be brought. By contrast, although 19 U.S.C. 1602-1604 impose what the court below characterized as "internal" requirements (see Pet. App. 5a) on government agents regarding prompt investigation, reporting, and filing of lawsuits, they do not specify any remedy or consequence if those internal standards are not met in a given case. In particular, nothing in 19 U.S.C. 1602-1604 suggests that an otherwise timely forfeiture action must be dismissed if a government employee fails to satisfy a vague standard of promptness in carrying out his duties.

In support of a rule of dismissal, respondent cites (Br. in Opp. 17) only several state cases in which forfeiture actions were dismissed because they were not filed within the time allowed by state law. Respondent entirely ignores the decisions of this Court, cited in our petition (at 20), that announce quite different principles for construing similar provisions in *federal* statutes. See *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 716-722 (1990); *Brock* v. *Pierce County*, 476 U.S. 253 (1986). As the Court reiterated in *Montalvo-Murillo*, "many statutory requisitions intended for the guide of

officers in the conduct of [the] business devolved upon them . . . do not limit their power or render its exercise in disregard of the requisitions ineffectual." 495 U.S. at 717-718 (quoting *French* v. *Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872)). For that reason, federal statutory provisions, such as those on which respondent relies, must be construed to conform to the "great principle of public policy * * * which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." 495 U.S. at 718 (quoting *Pierce County*, 476 U.S. at 260). Accordingly, here, as in *Montalvo-Murillo* and *Pierce County*, the failure to comply with the internal timeliness standards (if the district court should find such a failure on remand) does not foreclose the government from proceeding with the case. In fact, the Court specifically concluded in *United States* v. *$8,850*, 461 U.S. 555, 563 n.13 (1983), that it could not read into the statutory scheme governing forfeitures a short statute of limitations, "since 19 U.S.C. § 1621 (1976 ed., Supp. V) expressly allows the Government to bring a civil forfeiture proceeding within five years."[2]

* * * * *

[2] Contrary to respondent's contention (Br. in Opp. 14-15), this holding in *$8,850* is unaffected by the fact that Congress amended 19 U.S.C. 1603 to insert the word "promptly" after the seizure and forfeiture at issue in that case. There already were similar time requirements in 19 U.S.C. 1602 and 1604, and the Court concluded that they did not operate as judicially enforceable limitations periods, since 19 U.S.C. 1621 furnishes an express statute of limitations. Congress's subsequent insertion of a parallel time requirement in 19 U.S.C. 1603 does not alter the Court's conclusion that 19 U.S.C. 1621 furnishes the only judicially enforceable limitations period under the forfeiture statutes.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WILLIAM C. BRYSON
Acting Solicitor General

MARCH 1993

Supreme Court, U.S.
FILED
MAY 13 1993
OFFICE OF THE CLERK

(6)

No. 92-1180

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED JANUARY 8, 1993
CERTIORARI GRANTED MARCH 22, 1993

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UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

No. 89-612 HMF

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE OF TITLE NO. 249,207, TAX MAP KEY NO. 1-6-008-233(3), LOCATED AT KEAAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1989		
Aug 8	1	COMPLAINT for Forfeiture; Verification of Beverly A. Wee; Warrant of Arrest Warrant Issued
	2	Order Setting Rule 16 Scheduling Conference —2/8/90 @ 8:30 a.m., Tokairin
	3	Notice of Pendency of Action; Affidavit In Support of Pendency of Action; Exhibit "A" —on behalf of Plaintiff
29	4	Return of Service—property seized and posted 8-21-89
	5	Return of Service—unable to locate James Good

DATE	NR.	PROCEEDINGS
Sep 8	6	Ex Parte Motion for Court to Designate Newspaper of General Circulation—On Behalf of Plaintiff
11	7	ORDER Designating Newspaper of General Circulation—On Behalf of Plaintiff
13	8	Notice of Arrest and of Action to Forfeit Property to the United States
Oct 18	9	*ANSWER* to Complaint for Forfeiture; Certificate of Service on behalf of James Good
	10	Verified Claim; Demand for Jury Trial; Certificate of Service on behalf of James Good
19	11	Affidavit of Publication—as to September 27, 1989; October 4, 11, 1989
23	12	First Amended Answer to Complaint for Forfeiture; Certificate of Service—on behalf of Claimant James Daniel Good
		• • • •
Dec 14	19	Certificate of Service—as to Claimant's Response to First Request for Production Documents—on behalf of James Daniel Good
1990		
		• • • •
Jan 29	22	Scheduling Conference Statement of United States of America; Certificate of Service
Feb 1	23	Scheduling Conference Statement of Claimant James Good; Certificate of Service
8	24	*EP:* Rule 16—Jury selection and TRIAL 11-27-90 @ 9:30. Fong. Final PT 11-13-90 @ 9:30, Tokairin. Pretrial Statements 9-13-90. Motions filed/discovery noticed 9-27-90. Disclosure of experts for pltf 7-10-90; deft 7-24-90. Simultaneous exchange of experts' reports 8-24-90. Depos 9-24-90. PT Conf

DATE	NR.	PROCEEDINGS
1990		#2—6-8-90 @ 9, Tokairin. Takeuchi to prepare order
Feb 26	25	Pre Trial Preparation ORDER #1—On Behalf of Plaintiff *TOKAIRIN*
		• • • •
Jun 8	28	*EP:* PT conf No. 2—Counsel given review of approaching cut off dates. Discovery proceeding, no problems. Deposition of Good is set for July. Final PT: 11-13-90 at 9:30.
Jul 13	29	Notice of Motion; Claimant James Good's Motion for Summary Judgment; Memorandum in Support of Claimant James Good's Motion for Summary Judgment; Affidavit of Christopher J. Yuen; Affidavit of Eva Metz; Ex. "A"-"I"; Certificate of Service—8-13-90 @ 10:45
	30	Notice of Motion; Claimant James Good's Motion to Exclude Evidence; Memorandum in Support of Claimant James Good's Motion to Exclude Evidence; Affidavit of Christopher J. Yuen; Ex. "A"-"F"; Certificate of Service on behalf of Good—8-13-90 @ 10:45, Fong
		• • • •
Aug 3	33	Notice of Motion; Motion to Strike Claim and For Summary Judgment; Table of Contents and Table of Authorities; Memorandum of Points and Authorities in Support of Motion to Strike Claim and For Summary Judgment; Exhibits A-D; Declaration of Ronald Nakamichi; Declaration of Beverly Wee; Exhibit 1-2; Certificate of Service—9/3/90 @ 3:45 p.m. Fong

DATE	NR.	PROCEEDINGS
1990		
9	34	*EO:* Claimant Good's Motion for Summary Judgment contd to 9-4-90 at 3:45 p.m.
13	35	Stipulation Continuing Motion Dates [M/SJ contd to 9-4-90 at 3:45; Claimant Good's M/Exclude Evidence set for 8-13-90 contd to 9-17-90 at 3:00 p.m.]
17	36	Plaintiff's Opposition to Claimant James Good's Motion for Summary Judgment
20	37	Claimant James Good's Memorandum in Opposition to United States' Motion to Strike Claim and for Summary Judgment; Declaration of Christopher J. Yuen; Ex. "A";
23	38	Memorandum In Reply to James Good's Opposition to Plaintiff's Motion for Summary Judgment; Certificate of Service—On Behalf of Plaintiff
24	39	Claimant's Reply Memorandum In Support of Motion for Summary Judgment; Certificate of Service—on behalf of Claimant James Daniel Good
Aug 24	40	Affidavit of Nathalia Walker Richmond Presented in Opposition to Plaintiff's Motion for Summary Judgment; Certificate of Service
30	41	Affidavit of Noelie M. Rodriguez Presented in Opposition to Plaintiff's Motion for Summary Judgment; Certificate of Service—on behalf of James Good
30	42	Memorandum of Points and Authorities in Opposition to Motion to Exclude Evidence; Exhibits A and B; Certificate of Service—on behalf of Plaintiff

* * * *

DATE	NR.	PROCEEDINGS
1990		
Sep 4	44	*EP:* Claimant Good's Motion for Summary Judgment—Arguments heard. Claimant Good's Motion for Summary Judgment—Denied. Court to prepare written Order.
7	45	Plaintiff's Supplemental Evidentiary Submission and Memorandum In Supoprt of Motion for Summary Judgment; Exhibits "A" and "B"; Certificate of Service
10	46	Claimant James Good's Reply Memorandum in Support of Motion to Exclude Evidence; Exhibit "A"; Certificate of Service
11	47	ORDER Denying Claimant's Motion for Summary Judgment—cc: all counsel
13	48	Pre Trial Statement of Plaintiff United States; Certificate of Service
	49	Claimant James Daniel Good's Pre Trial Statement; Certificate of Service
	50	Claimant James Good's Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment; Certificate of Service
17	51	*EP:* 1) Motion to Strike Claim and for Summary Judgment; 2) Claimant Good's Motion to Exclude Evidence; 3) Governments Motion for Summary Judgment—arguments heard. Claimant Good's Motion to Exclude Evidence DENIED. Governments Motion for Summary Judgment GRANTED. Claimant's Motion to Strike Claim and for Summary Judgment DENIED. Ms. Wee to prepare order
26	52	ORDER Denying Claimant James Good's Motion to Exclude Evidence and Granting

DATE	NR.	PROCEEDINGS
1990		
		Plaintiff's Motion for Summary Judgment—Plaintiff's Motion for Summary Judgment is Granted. Defendant property is hereby forfeitued to Plaintiff United States of America.
Oct 3	53	JUDGMENT in a Civil Case—That Summary Judgment is entered in favor of Plaintiff and against Defendant. IT IS FURTHER ORDERED that Defendant property is hereby forfeited to Plaintiff United States of America. cc: All parties of record
17	54	Notice of Appeal—(by claimant James Daniel Good)
Nov 1		Notice of Appeal sent to Clerk, 9th CCA & to all counsel
		• • • •
Nov 8		Transcript of Proceedings—9/4/90—Orig—YI
		Transcript of Proceedings—9/17/90—Orig—YI

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

No. 90-16636

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES DANIEL PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE OF TITLE NO. 249, 207, TAX MAP KEY NO. 1-6-008-233(3), LOCATED AT KEEAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT-APPELLANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/12/90	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement, setting schedule as follows: CADS due 11/26/90 for Christopher J. Yuen; appellant's designation of RT is due 10/29/90; appellee's designation of RT is due 11/6/90; appellant shall order transcript by 11/16/90; court reporter shall file transcript in DC by 12/17/90; certificate of record shall be filed by 12/24/90; appellant's opening brief is due 2/4/91; appellees' brief is due 3/4/91; appellants' reply brief is due 3/18/91; [90-16636]
	• • • •

DATE	PROCEEDINGS
2/5/91	Filed original and 15 copies Appellant James Daniel Good opening brief (Informal: n) 48 pages and five excerpts of record in 1 volumes; served on 2/1/91 [90-16636] [Entry date 02/06/91]
3/1/91	Received Appellant James Daniel Good's addendum appellant's excerpt of record (order omitted from excerpt) brief [1878154-1], served on 2/25/91 (RECORDS) [90-16636] [Entry date 03/07/91]
3/7/91	Filed original and 15 copies appellee USA's 41 pages brief, 0 Exc. vols.; served on 3/4/91 [90-16636] (sm)
	* * * *
3/21/91	Filed original and 15 copies James Daniel Good reply brief, (Informal: n) 16 pages; served on 3/18/91 [90-16636]
3/31/91	Claimant James Daniel Good appeals the district court's denial of his summary judgment motion and grant of summary judgment in favor of the United States in the United States' ciivl forfeiture action against real property owned by Good located on the Big Island of the State of Hawaii. The basis of the forfeiture was the property's use to manufacture and distribute a controlled substance. ISSUES: 1. Was the forfeiture properly commenced within the applicable statute of limitations, as required by 21 U.S.C. sec 881(a)(7) and 19 U.S.C. sec 1604? 2. Did the forfeiture violate the double jeopardy clause because it represents a second punishment after Good had already been criminally prosecuted for the same act?

DATE	PROCEEDINGS
	3. Did the forfeiture violate the due process clause due to the lack of a pre-seizure hearing? 4. Did the district court err in denying Good's "Motion to Exclude Evidence" discovered pursuant to the search of the subject properly because the affidavit in support of the search warrant was not supported by probable cause? 5. If evidence resulting from the search is excluded, did the district court err in not granting summary judgment in favor of Good because his guilty plea and conviction for promoting a harmful drug (Hawaii Rev. Stat. sec 712-1245(1)(b) do not establish the necessary proof and the guilty plea was the fruit of the illegal search? Date 3/22/91 [90-16636] [Entry date 04/08/91]
	* * * *
12/11/91	ARGUED AND SUBMITTED TO Ruggero J. Aldisert, Alfred T. GOODWIN, John T. NOONAN [90-16636]
	* * * *
4/24/92	FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Ruggero J. Aldisert; Alfred T. GOODWIN, author; John T. NOONAN, dissenting.) (FILED AND ENTERED JUDGMENT. [90-16636] [Entry date 04/29/92]
4/30/92	Filed USA motion to extend time to file petition for rehearing until [90-16636] served on 4/29/92 (Judge GOODWIN) [Entry date 05/01/92]
5/11/92	Filed order (Alfred T. GOODWIN): The government's motion for an extention of time to 06/08/92, within which to file its petition for re-

DATE	PROCEEDINGS
	hearing with suggestion for rehearing en banc is GRANTED. [2125846-1] [90-16636]
	* * * *
6/10/92	Filed original and 40 copies Appellee USA petition for rehearing with suggestion for rehearing en banc. (PANEL AND ALL ACTIVE JUDGES) 16 p.pages, served on 6/8/92 [90-16636]
9/10/92	Filed order and amended opinion (Judges Ruggero J. Aldisert, Alfred T. GOODWIN, author, John T. NOONAN, dissenting) (Orig. opinion id:) The opinion filed 4/24/92 is amended as follows: (SEE CASEFILE FOR COMPLETE TEXT) With these amendments, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected. [90-16636] [Entry date 09/11/92]
9/18/92	MANDATE ISSUED [90-16636]
1/19/93	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 92-01180 filed on 01/80/93. [90-16636] [Entry date 02/09/93]
3/25/93	Received notice from Supreme Court, petition for certiorari GRANTED on 03/22/93 [Entry date 03/31/93]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 89-00612 HMF

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE OF TITLE NO. 249,207, TAX MAP KEY NO. 1-6-008-233 (3), LOCATED AT KEAAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT

COMPLAINT FOR FORFEITURE; VERIFICATION OF BEVERLY A. WEE; WARRANT OF ARREST

[Filed Aug. 8, 1989]

COMPLAINT FOR FORFEITURE

For its claim of forfeiture against Defendant, Property Titled in the Name of James Daniel Good, Described in Transfer Certificate of Title No. 249,207, Tax Map Key No. 1-6-008-233(3), located at Keaau, District of Puna, Island and County of Hawaii, State of Hawaii, together with appurtenances and improvements (hereinafter "Defendant"), Plaintiff UNITED STATES OF AMERICA (hereinafter "USA"), alleges as follows:

1. This Court has jurisdiction of this action under 28 U.S.C. § 1345 and 21 U.S.C. § 881(a)(7). That the Defendant real property with improvements and appurtenances thereto lying in Puna, Island and County of

Hawaii, State of Hawaii, is more fully described as follows:

All of that certain parcel of land situate at Keaau, District of Puna, Island and County of Hawaii, State of Hawaii, described as follows:

LOT 8941, area 4.000 acres, Block W-W-W, as shown on Map 53, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii with Land Court Application No. 1053 (amended) of W.H. Shipman, Limited;

Together with an undivided 2/2490th interest, in Roadway Lot 8215, area 213.264 acres, as shown on said Map 53, to be used in common with others entitled thereto for a right of way for road purposes only;

Being the land(s) described in Transfer Certificate of Title No. 249,207 issued to JAMES DANIEL GOOD, unmarried.

2. That defendant real property with appurtenances and improvements was used or was intended to be used, in any manner or part, to commit, or to facilitate a commission of a violation of Title 21, United States Code, the Controlled Substances Act which is punishable by more than one year's imprisonment, all in violation of Title 21, United States Code, Sections 881(a)(7) and 841 as is set forth in the following facts:

a. That on January 31, 1985, upon execution of a search warrant, the following items, among others, were recovered from within defendant property:

(1) 272.4 grams of marijuana seeds;

(2) 39,199.3 grams of processed marijuana; and

(3) vials containing hashish oil, a heat seal machine, and can sealer.

3. That defendant real property is titled in the name of James Daniel Good.

4. That the defendant real property with appurtenances and improvements is now and during the pendency of this action will be in the jurisdiction of this Court.

5. That by reason of these premises defendant real property with appurtenances and improvements is forfeited to the United States pursuant to the provisions of 21 U.S.C. § 881(a)(7).

WHEREFORE, USA Prays that:

1. The Clerk of this Court issue a warrant for the arrest of Defendant and deliver it forthwith to the United States Marshal;

2. The Court enter judgment in favor of the United States of America, forfeiting Defendant Property Titled in the Name of James Daniel Good, Described in Transfer Certificate of Title No. 249,207, Tax Map Key No. 1-6-0081233(3), located at Keaau, District of Puna, Island and County of Hawaii, State of Hawaii, together with appurtenances and improvements to the USA; and

3. The Court award such further and other relief as is deemed just and appropriate.

DATED: Honolulu, Hawaii, Aug. 7, 1989.

DANIEL BENT
United States Attorney
District of Hawaii

By /s/ Beverly A. Wee
BEVERLY A. WEE
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. ———

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE OF TITLE NO. 249,207, TAX MAP KEY NO. 1-6-008-233 (3), LOCATED AT KEAAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT

VERIFICATION OF BEVERLY A. WEE

I, BEVERLY A. WEE, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

I am an Assistant United States Attorney in the District of Hawaii, and I have read the attached Complaint and know the contents thereof; the information contained in the Complaint has been furnished by official government sources; and, based on information and belief, the allegations contained in the Complaint are true.

DATED: August 7, 1989, at Honolulu, Hawaii.

/s/ Beverly A. Wee
BEVERLY A. WEE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. ———

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE OF TITLE NO. 249,207, TAX MAP KEY NO. 1-6-008-233 (3), LOCATED AT KEAAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT

WARRANT OF ARREST

TO: THE UNITED STATES MARSHAL FOR THE DISTRICT OF HAWAII:

WHEREAS, on the 8th day of Aug. 1989, a Complaint for Forfeiture was filed in the United States District Court for the District of Hawaii by the UNITED STATES OF AMERICA against the following described property:

> Property Titled in the Name of James Daniel Good, Described in Transfer Certificate of Title No. 249,207, Tax Map No. 1-6-008-233(3), located at Keaau, District of Puna, Island and County of Hawaii, State of Hawaii.

YOU ARE HEREBY COMMANDED to arrest and attach the said property and to detain the same in your custody until further order of this Court. Further, what

you have done in the premises, do you then and there make return thereof, together with this Writ.

DATED: Honolulu, Hawaii, Aug. 8, 1989

WALTER A. Y. H. CHINN
Clerk
United States District Court
for the District of Hawaii

By /s/ [Illegible]
Deputy Clerk
United States District Court
for the District of Hawaii

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civ. No. 89-00612 HMF

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE OF TITLE NO. 249,207, TAX MAP KEY NO. 1-6-008-233 (3), LOCATED AT KEAAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT

ANSWER TO COMPLAINT FOR FORFEITURE; CERTIFICATE OF SERVICE

ANSWER TO COMPLAINT FOR FORFEITURE

Comes now claimant James Daniel Good (hereinafter "claimant") by and through his undersigned counsel, for answer to the complaint for forfeiture filed herein, pursuant to Supplemental Rule C(6) of the Federal Rules of Civil Procedure, and alleges and avers as follows:

FIRST DEFENSE

1. The complaint for forfeiture fails to state a claim upon which relief may be granted.

SECOND DEFENSE

2. Claimant admits the allegations in paragraphs 1, 3, and 4 of the complaint. With respect to paragraph 2 of the complaint, claimant has been informed that items of the general nature described in the complaint were al-

leged to have been taken from the subject property on or about January 31, 1985, but lacks information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 2, and therefore denies them.

THIRD DEFENSE

3. The complaint for forfeiture was not timely commenced because it was not initiated shortly after the filing of state court criminal proceedings concerning the offense alleged to have been committed on or about January 31, 1985 on the subject property.

FOURTH DEFENSE

4. Claimant has been prejudiced by the delay between the accrual of the cause of action and the commencement of forfeiture proceedings, and therefore, the complaint for forfeiture is barred by laches.

FIFTH DEFENSE

5. Under the facts of this case, forfeiture of the property constitutes cruel, unusual, and disproportionate punishment in violation of claimant's rights under the Eighth Amendment to the Constitution of the United States.

SIXTH DEFENSE

6. Under the facts of this case, forfeiture of the property constitutes a taking of claimant's property without compensation and without due process of law in violation of claimant's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

SEVENTH DEFENSE

7. Under the facts of this case, forfeiture of the property violates claimant's rights under the Double Jeopardy Clause of the United States Constitution.

EIGHTH DEFENSE

8. The doctrine of judicial restraint applies to the complaint for forfeiture, and therefore, portions of the property are not subject to forfeiture.

NINTH DEFENSE

9. Forfeiture is limited to the portion of the property directly used in violation of the underlying criminal statute.

TENTH DEFENSE

10. The present proceedings depend upon evidence and information obtained in violation of claimant's right to be free from unreasonable searches and seizures and his right to privacy, under the applicable provisions of the United States Constitution.

ELEVENTH DEFENSE

11. Plaintiff failed to initiate this action within the applicable period of limitatons after it had knowledge of the accrual of the cause of action, and the complaint is, therefore, barred by the statute of limitations.

TWELFTH DEFENSE

12. Claimant asserts the defense of innocent ownership with respect to any use of the subject property in violation of Title 21, United States Code, within the applicable period of limitations.

Claimant's attorney appears specially on behalf of claimant James Daniel Good for the sole and limited purpose of asserting his claim to the property and does not appear generally, reserving all objections to the assertion of general jurisdiction over his person.

Wherefore, claimant prays that the complaint for forfeiture be dismissed, that he be restored to possession of

the property, and that he be awarded his costs, attorney's fees, and any other just and proper relief.

DATED: Hilo, Hawaii, October 17, 1989

/s/ Christopher J. Yuen
CHRISTOPHER J. YUEN
Attorney for
James Daniel Good
Claimant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on the following by mailing the same, postage prepaid, on October 17, 1989, to:

Beverly Wee, Esq.
Assistant U.S. Attorney
Room C-242, U.S. Courthouse
300 Ala Moana Boulevard
Post Office Box 50183
Honolulu, Hawaii 96850
Attorney for Plaintiff United States of America

DATED: Hilo, Hawaii, October 17, 1989

/s/ Christopher J. Yuen
CHRISTOPHER J. YUEN
Attorney for Claimant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civ. No. 89-00612 HMF

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE OF TITLE NO. 249,207, TAX MAP KEY NO. 1-6-008-233 (3), LOCATED AT KEAAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT

VERIFIED CLAIM; DEMAND FOR JURY TRIAL; CERTIFICATE OF SERVICE

[Filed Oct. 18, 1989]

VERIFIED CLAIM

Comes now claimant James Daniel Good (hereinafter "claimant"), by and through his undersigned counsel, and alleges and avers as follows:

1. Claimant is the legal and equitable owner in fee simple of the property which is the subject of this action, described as Tax Map Key (3) 1-6-008-233, located at Keaau, Puna, Island and County of Hawaii, State of Hawaii, and all improvements and appurtenances thereon (hereinafter "the property").

2. Claimant obtained legal title to the property by warranty deeds dated December 12, 1978 and October 4, 1982 in exchange for good and valuable consideration.

3. Claimant is holder of Transfer Certificate of Title No. 249,207, which describes the property.

4. Claimant is the lawful owner of the property to the exclusion of all others, including the United States of America.

Claimant's attorney appears specially on behalf of claimant James Daniel Good for the sole and limited purpose of asserting his claim to the property and does not appear generally, reserving all objections to the assertion of general jurisdiction over his person.

Wherefore, claimant prays that the complaint for forfeiture be dismissed, that he be restored to possession of the property, and that he be awarded his costs, attorney's fees, and any other just and proper relief.

DATED: Hilo, Hawaii, October 17, 1989

/s/ Christopher J. Yuen
CHRISTOPHER J. YUEN
Attorney for Claimant

VERIFICATION

STATE OF HAWAII)
) ss.
COUNTY OF HAWAII)

Christopher J. Yuen, being first duly sworn on oath, deposes and says:

1. I am an attorney in good standing licensed to practice before the United States District Court for the State of Hawaii.

2. I am duly authorized by James Daniel Good, claimant, to assert this Verified Claim on his behalf.

3. The Verified Claim attached hereto is true and correct to the best of my knowledge, information, and belief.

/s/ Christopher J. Yuen
CHRISTOPHER J. YUEN

Subscribed and sworn to before me this 17th day of October, 1989.

/s/ [Illegible] K. Thompson
Notary Public, State of Hawaii

My commisison expires: 8-29-93

DEMAND FOR JURY TRIAL

Comes now claimant James Daniel Good, by and through his undersigned counsel, pursuant to Rule 38 of the Federal Rules of Civil Procedure, and demands trial by jury of all issues so triable herein.

DATED: Hilo, Hawaii, October 17, 1989

/s/ Christopher J. Yuen
CHRISTOPHER J. YUEN
Attorney for Claimant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 89-00612 HMF

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE OF TITLE NO. 249,207, TAX MAP KEY NO. 1-6-008-233 (3), LOCATED AT KEAAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT

FIRST AMENDED ANSWER TO COMPLAINT FOR FORFEITURE; CERTIFICATE OF SERVICE

[Filed Oct. 23, 1989]

FIRST AMENDED ANSWER TO COMPLAINT

Claimant James Daniel Good (hereinafter "Claimant"), by and through his undersigned counsel, hereby amends his Answer to the Complaint for Forfeiture filed herein as follows: in addition to the specific admissions and denials stated in paragraph 2 of his Answer to Complaint for Forfeiture, Claimant denies the allegations in paragraph 5 of the Complaint for Forfeiture.

DATED: Hilo, Hawaii, October 19, 1989

/s/ Christopher J. Yuen
CHRISTOPHER J. YUEN
Attorney for Claimant
James Daniel Good

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Mag. No. 89-0267 MT

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE OF TITLE NO. 249,207, TAX MAP KEY NO. 1-6-008-233 (3), LOCATED AT KEAAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT

SEIZURE WARRANT

[Filed Aug. 18, 1989]

TO: THE UNITED STATES MARSHAL FOR THE DISTRICT OF HAWAII, OR HER DESIGNEE AND TO THE UNITED STATES DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, SPECIAL AGENT ROBERT AIU AND OTHER AUTHORIZED LAW ENFORCEMENT OFFICERS:

Affidavit having been made before me by Special Agent Robert Aiu of the Drug Enforcement Administration, that he has reason to believe that defendant, Property Titled in the Name of James Daniel Good, described in Transfer Certificate of Title No. 249,207, Tax Map Key No. 1-6-008-233(3), located at Keaau, District of Puna, Island and County of Hawaii, State of

Hawaii, together with appurtenances and improvements, is subject to seizure and forfeiture in the District of Hawaii under Title 21, United States Code, Section 881 (a)(7) and 841, and as I am satisfied that there is probable cause to believe that the property so described was used or was intended to be used, in any manner or part, to commit, or to facilitate a commission of a violation of Title 21, United States Code, the Controlled Substances Act, which is punishable by more than one year's imprisonment, in violation of Title 21, United States Code, Sections 881(a)(7) and 841 and is subject to forfeiture.

YOU ARE HEREBY COMMANDED to seize the property specified, servicing this warrant and make the seizure and leave a copy of this warrant. You are also commanded to enter into upon the defendant property located in Keaau, District of Puna, Island and County of Hawaii, State of Hawaii, for the purpose of appraising the value of the property, photographing and inspecting the exterior and interior of any appurtenances and improvements, including any dwelling, and to ensure the condition of the premises and to ensure the absence of any safety hazards, and to prepare a written inventory of the property seized and promptly return this warrant and bring the inventory and return the property before me as required by law.

DATED this 18th day of Aug., 1989.

/s/ [Illegible]
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Mag. No. 89-0267 MT

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE OF TITLE NO. 249,207, TAX MAP KEY NO. 1-6-008-233 (3), LOCATED AT KEAAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT

AFFIDAVIT IN SUPPORT OF SEIZURE WARRANT

[Filed Aug. 18, 1989]

BEFORE Bert S. Tokairin, United States Magistrate,

I, ROBERT AIU, being duly sworn, deposes and says that;

1. I am a Special Agent with the Department of Justice Drug Enforcement Administration currently stationed at the DEA Hilo, Hawaii office.

2. I have been involved in narcotics investigations and work closely with the Hawaii County Police Department. I am familiar with the investigation and subsequent arrest made by Detective Ronald Nakamichi of the Hawaii County Police on January 31, 1985, of one James Daniel Good at 37th and Ilima in the Orchid Land Estates in Puna, Island of Hawaii. I am also familiar with the police report prepared by Detective Nakamichi and

all the files and records kept by the Hawaii County Police Department on this particular matter.

3. Based on my familiarity with these records and the report prepared by Detective Nakamichi, I have reason to believe that defendant, Property Titled in the Name of James Daniel Good, described in Transfer Certificate of Title No. 249,207, Tax Map Key No. 1-6-008-233 (3), located at Keaau, District of Puna, Island and County of Hawaii, State of Hawaii, ("the property"), together with appurtenances and improvements, is subject to forfeiture under Title 21, United States Code, Section 881(a)(7) because it was used or intended to be used in any manner or part, to commit, or to facilitate the commission of, a violation of Subchapter I of Chapter 13 of Title 21, United States Code, punishable by more than one year's imprisonment.

The facts tending to establish the foregoing grounds for issuance of a Seizure Warrant are as follows:

1. Detective Nakamichi obtained information from a reliable informant ("C-1") that a hash oil machine and marijuana were located within the property; that C-1 had personally been inside a residence located on the property and viewed the machinery and marijuana, and that the owner of the property, James Daniel Good, informed him that he was manufacturing the hash oil for shipment to the mainland.

2. Detective Nakamichi also obtained information from another reliable informant ("C-2") who had previously given truthful and accurate information to him on at least four prior occasions. C-2 informed Nakamichi that he had been invited to the property and that he viewed an electric hash oil machine on the property. C-2 also informed Nakamichi that he had observed hash oil and marijuana within the property numerous times in the past.

3. Based upon this information, Detective Nakamichi obtained a search warrant which was subsequently served

on January 31, 1985. Upon a search of the property, the following items, among others, were recovered: 272.4 grams of marijuana seeds, 39,199.3 grams of processed marijuana, a heat seal and can seal machine, and large amounts of cash.

4. As a result of the search, James Daniel Good was arrested and a complaint issued on June 4, 1985, charging him with promoting a harmful drug in the second degree, in violation of Section 712-1245-(1)(b) of the Hawaii Revised Statutes. On August 7, 1985, James Daniel Good was found guilty of these charges.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Robert Aiu
ROBERT AIU
Special Agent
Drug Enforcement Administration

Subscribed and sworn to before me this 18th day of Aug. 1989.

/s/ Bert S. Tokairin
United States Magistrate
District of Hawaii

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Case Number: Civil No. 89-00612 HMF

UNITED STATES OF AMERICA

v.

PROPERTY TITLED IN THE NAME OF
JAMES DANIEL GOOD, ET AL.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Summary Judgment is entered in favor of Plaintiff and against Defendant. IT IS FURTHER ORDERED that Defendant property is hereby forfeited to Plaintiff United States of America.

cc: All parties of record

Date Oct. 3, 1990

/s/ Walter A.Y.H. Chinn
WALTER A.Y.H. CHINN
Clerk

SUPREME COURT OF THE UNITED STATES

No. 92-1180

UNITED STATES, PETITIONER

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.

ORDER ALLOWING CERTIORARI

Filed March 22, 1993

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

March 22, 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 67010

BEST AVAILABLE COPY

FILED
MAY 13 1993
OFFICE OF THE CLERK

No. 92-1180

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the seizure of the respondent real property for forfeiture, pursuant to a warrant issued by a magistrate judge based on a finding of probable cause, violated the Due Process Clause of the Fifth Amendment because the owner (who did not reside on the premises) was not given notice and an opportunity for a hearing prior to the seizure.

2. Whether a civil action under 21 U.S.C. 881(a)(7) for forfeiture of property used in the commission of a drug offense can be statutorily time-barred even if it is filed within the five-year statute of limitations in 19 U.S.C. 1621.

PARTIES TO THE PROCEEDING

The petitioner in this civil forfeiture action is the United States of America. The respondent is the parcel of real property that is the subject of the forfeiture action. James Daniel Good, the owner of the property, filed a claim and participated in the proceedings below.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1180

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals, as amended on denial of rehearing (Pet. App. 1a-17a), is reported at 971 F.2d 1376. The opinions of the district court (Pet. App. 18a-22a, 23a-33a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1992. A petition for rehearing was denied on September 10, 1992. Pet. App. 2a. On November 25, 1992, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including January 8, 1993. The petition was filed on that date and was granted on

March 22, 1993. J.A. 33. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution; the Due Process Clause of the Fifth Amendment; 21 U.S.C. 881; and 19 U.S.C. 1600-1610 and 1621 are reproduced at Pet. App. 34a-49a.

STATEMENT

1. On January 31, 1985, Hawaii law enforcement officers executed a warrant authorizing the search of the respondent real property, owned by James Daniel Good. The search uncovered 89 pounds of marijuana, marijuana seeds, vials containing hashish oil, drug paraphernalia, and more than $7000 in United States currency. On July 3, 1985, Good pleaded guilty to one count of promoting a harmful drug in the second degree, in violation of Haw. Rev. Stat. § 712-1245(1)(b) (1988). He was sentenced to one year's imprisonment, a period of community service, and a $1000 fine, and he forfeited $3187 in cash found on the premises. Pet. App. 3a, 23a; C.A. Clerk's Rec. 45, Exh. B.

2. a. On August 8, 1989, the United States filed this in rem action seeking forfeiture of the respondent real property under 21 U.S.C. 881(a)(7) on the ground that it had been used to commit or facilitate commission of a federal drug offense. J.A. 11-13. On the same day, in accordance with Rule C(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims, the district court clerk issued a warrant of arrest, which directed the United States Marshal to arrest and attach the property and to

detain it in his custody until further order of the court. J.A. 15-16.[1] On August 18, 1989, a United States magistrate judge signed a warrant authorizing seizure of the property, finding probable cause to believe that it was subject to forfeiture under 21 U.S.C. 881(a)(7). J.A. 27-28.[2] That finding was based on the affidavit of Special Agent Robert Aiu of the Drug Enforcement Administration, which in turn relied on the evidence seized during the January 1985 search of the premises by state police and Good's ensuing conviction in state court. J.A. 29-31; see Pet. App. 3a. The warrant commanded the

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[1] The Supplemental Rules are made applicable to forfeiture proceedings by Rule A of those Rules and by 28 U.S.C. 2461(b) and 21 U.S.C. 881(b). Rule C(3) provides that "[i]n actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances."

[2] Under the first paragraph of 21 U.S.C. 881(b), property subject to civil forfeiture under the federal drug laws "may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court having jurisdiction over the property." Section 881(b) also preserves the Attorney General's authority to seize property for forfeiture without such process—*i.e.*, prior to initiation of forfeiture proceedings—where, *inter alia*, the Attorney General has probable cause to believe that the property is subject to forfeiture under the drug laws, 21 U.S.C. 881(b)(4). Section 881(b) does not require the Attorney General to obtain a warrant for the seizure of property subject to forfeiture, but the last paragraph of Section 881(b) permits the government to request such a warrant in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure. See pages 15-16, *infra*.

U.S. Marshal, DEA Agent Aiu, and other authorized law enforcement officers to seize the property and to enter it for purposes of inspecting it and ensuring its condition. J.A. 28. The property was seized and posted on August 21, 1989. Pet. App. 24a; J.A. 1.[3]

Good was living in Nicaragua at the time of the seizure, and the house was occupied by tenants. The tenants were permitted to remain on the premises upon their agreement to pay their rent to the U.S. Marshal. Pet. App. 4a, 24a. On October 18, 1989, Good filed a verified claim to the property and an answer to the complaint. J.A. 22-23.

b. In an order dated September 11, 1990, the district court denied Good's motion for summary judgment, Pet. App. 23a-33a, rejecting his contention that the action was not timely filed. *Id.* at 28a-30a. The court pointed out that by virtue of 21 U.S.C. 881(d), forfeiture proceedings based on violations of the federal drug laws are governed by the procedures under the customs laws. The statute of limitations under the latter laws, 19 U.S.C. 1621, provides that "[n]o suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered." The instant for-

[3] The seizure warrant was not formally made a part of the record in this case. The warrant bears the same caption as this case in the district court, but has its own docket number, Mag. No. 89-0267 MT. Counsel for respondent Good has agreed to inclusion of the warrant in the Joint Appendix in this Court. J.A. 27-28. A prior seizure warrant was issued on August 8, 1989, but we have been informed by the U.S. Attorney's Office that a new warrant was required because the original warrant was not executed within 10 days.

feiture action was timely, the court concluded, because it was filed less than five years after the search of the premises on January 31, 1985, which uncovered the evidence on which the forfeiture was based. Pet. App. 30a. The court also held that the seizure of the property without prior notice to Good and an opportunity to be heard did not violate the Due Process Clause. *Id.* at 33a.

On September 26, 1990, the district court granted the United States' motion for summary judgment. Pet. App. 18a-22a. The court concluded that, "based on the recovery of substantial amounts of drugs and drug instrumentalities," the United States had established probable cause that the property was used to facilitate a violation of 21 U.S.C. 841, and was therefore subject to forfeiture. Pet. App. 21a. Under 19 U.S.C. 1615, the burden then shifted to Good to show by a preponderance of the evidence that the property was not subject to forfeiture, by demonstrating either (1) that it was not used for an unlawful purpose, or (2) that Good was an innocent owner within the meaning of 21 U.S.C. 881(a)(7). The court found that Good had failed to carry that burden, explaining that it was "satisfied that the [respondent] property was used for illegal purpose[s] based on the drugs and drug instrumentalities located within the property," and that Good had offered no evidence of innocent ownership. Pet. App. 21a-22a. The court accordingly declared the property forfeited to the United States. *Id.* at 22a.

3. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1a-17a.

a. Over Judge Noonan's dissent, the court of appeals first held that the district court had erred in

finding the action timely. Pet. App. 4a-12a. The court of appeals accepted Good's argument that the five-year statute of limitations in 19 U.S.C. 1621 is only an "outer limit" for filing a forfeiture action, and that further limits are imposed by 19 U.S.C. 1602-1604. Pet. App. 5a. Those provisions, the court explained, impose a "series of internal notification and reporting requirements," under which "customs agents must report to customs officers, *see* 19 U.S.C. § 1602, customs officers must report to the United States attorney, *see* 19 U.S.C. § 1603, and the Attorney General must 'immediately' and 'forthwith' bring a forfeiture action if he believes that one is warranted, *see* 19 U.S.C. § 1604." Pet. App. 5a. The court held those reporting duties applicable to DEA and FBI agents, because those agents are designated to seize property subject to forfeiture under the Controlled Substances Act, 21 U.S.C. 801 *et seq.* Pet. App. 11a (quoting 21 C.F.R. 1316.72).

The court of appeals rejected the government's contention that the duties in 19 U.S.C. 1602-1604 apply only when the property has already been seized, and that they were inapplicable in this case because the respondent property was not seized until after the forfeiture action was commenced. The court pointed out that 19 U.S.C. 1602 and 1603 refer to discovery of violations of the law as well as to seizures of property, and it concluded that the duty of agents to report promptly to the Attorney General is triggered in both situations. Pet. App. 7a-11a. The court accordingly remanded for the district court to determine when Special Agent Aiu or any other DEA agent obtained actual knowledge of the alleged offense, which would, in the court's view, have triggered a duty to make a prompt report. *Id.* at 12a.

Judge Noonan dissented on the timeliness issue, expressing the view that the majority "has converted a set of housekeeping rules for the government into statutory protection for the property of malefactors." Pet. App. 17a. He reasoned that once property has been used in the commission of a narcotics offense, it is subject to forfeiture, and that "[t]he only relevant restriction is the statute of limitations, which bars suit five years after the time of discovery." *Ibid.* In Judge Noonan's view, the majority's opinion not only "in effect, creates a new statute of limitations," but "also provides a new construction of a statute that has been in existence for almost seventy years and has been applied in a variety of contexts to customs offenses without any court ever giving the statute the application given in this case." *Ibid.*

b. The court of appeals further held that the seizure of the premises without giving Good prior notice and an opportunity for a hearing violated his due process rights. Pet. App. 12a-16a. The court noted that, under *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), due process ordinarily requires notice and an opportunity to be heard prior to a deprivation of property and that exceptions to that rule are warranted only in "extraordinary situations," often characterized by "a special need for very prompt action." Pet. App. 14a (quoting 407 U.S. at 90-91). The court found no such circumstances here. Pet. App. 14a-16a.

The court of appeals recognized that extraordinary circumstances were found in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), which held that notice and an opportunity to be heard were not required prior to the seizure of a yacht for forfeiture. But the court distinguished *Calero-Toledo* on

the ground that the seizure there was of personal property. Pet. App. 14a. In its view, "real property is distinct from personal property" for due process purposes, because the fact that real property cannot be moved eliminates the need for "very prompt action." *Ibid.* In addition, although Good did not reside on the respondent property, but was instead renting it to tenants, the court nonetheless found a preseizure hearing necessary because "[p]eople have a particularly strong interest in their homes, and the government has a less significant interest in seeking forfeiture prior to giving notice and an opportunity to be heard." *Id.* at 14a-15a.[4]

SUMMARY OF ARGUMENT

The court of appeals fundamentally erred in its disposition of two distinct issues of broad importance in the administration of the federal forfeiture laws.

I.A. The Due Process Clause does not require notice and an opportunity for a hearing before property is seized for forfeiture. That was especially true in this case because, in accordance with Justice Department policy, the seizure was made pursuant to a warrant issued by a magistrate on the basis of prob-

[4] Although the court of appeals found a due process violation, it concluded that the violation need not invalidate the forfeiture. That is so, the court reasoned, because "[t]he 'mere fact of the illegal seizure, standing alone, does not immunize the [seized] goods from forfeiture.'" Pet. App. 16a (quoting *United States* v. *One (1) 1971 Harley-Davidson Motorcycle*, 508 F.2d 351, 351 (9th Cir. 1974)). The court nevertheless held that, in view of the due process violation it found, Good was entitled to the rents the United States collected from the tenants following the seizure. Pet. App. 16a.

able cause, and Good's tenants were permitted to remain on the premises. Seizures pursuant to a warrant are expressly authorized by 21 U.S.C. 881(b), and the court of appeals has effectively held that statutory provision unconstitutional.

B. Because the seizure was undertaken pursuant to a warrant issued on the basis of probable cause, it was "reasonable" under the Fourth Amendment. Moreover, this Court held in *United States* v. *Monsanto*, 491 U.S. 600, 615-616 (1989), that a house may be restrained prior to trial on the basis of probable cause, especially where the occupant is not removed.

Warrants have traditionally been issued on the basis of an ex parte showing. The text of the Fourth Amendment endorses that practice, for it requires only that probable cause be "supported by Oath or affirmation." In *Gerstein* v. *Pugh*, 420 U.S. 103, 119-122 (1975), the Court held that an adversary hearing is not required on the question of probable cause to detain a criminal defendant pending trial. *A fortiori*, a similar rule should apply to a seizure of property, especially since the government makes out a prima facie case of forfeiture on the merits by establishing probable cause for institution of the suit, and it may do so on the basis of an affidavit such as that submitted by the DEA agent in this case. Although this Court has enforced the Fourth Amendment with particular firmness in the context of a search of a house, it has done so by insisting on compliance with the Warrant Clause of that Amendment, not an adversary hearing.

C. The Due Process Clause imposes no additional procedural requirements in this setting. It is through the Fourth Amendment that the Framers of the Bill

of Rights struck the balance between the people's security in their persons, houses, papers and effects and the public interest in searches and seizures for law enforcement purposes. Accordingly, compliance with the standards and procedures prescribed by the Fourth Amendment constitutes all the "process" that is "due" under the Fifth Amendment.

This Court has already held that "seizure for purposes of forfeiture is one of those 'extraordinary situations' that justify postponing notice and opportunity for a hearing." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 677 (1974). The court below erred in attempting to distinguish *Calero-Toledo* on the ground that there the property was moveable, while here it is not. The Court noted in *Calero-Toledo* that preseizure notice might frustrate the interests served by the forfeiture statutes "since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed." 416 U.S. at 679. But the Court did not suggest that the government must show that removal, destruction, or concealment of the property was likely in the particular case before seizure would be justified without prior notice and a hearing. In addition, although a residence cannot readily be removed to another jurisdiction, it can, like the yacht in *Calero-Toledo*, be "destroyed" and its contents "concealed."

The court of appeals' due process ruling is without merit even under the three-factor balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). First, the private interest at stake is not substantial, because Good did not live on the premises and his tenants were permitted to remain. Second, *Gerstein* v. *Pugh* held that probable cause can reliably be

determined on the basis of an ex parte showing and that adversary proceedings would be of only slight additional value. Third, the government's interests are substantial, because the government claims title to the property and has a strong interest in protecting it and preventing its use for illegal purposes.

II. A. The court of appeals also erred in holding that 19 U.S.C. 1602-1604 confer a right on a claimant to have a forfeiture action dismissed if the court concludes that law enforcement agents did not act with sufficient dispatch in carrying out certain reporting duties. In the forfeiture context, Section 1603(b)'s requirement that an agent report a violation "promptly" to the U.S. Attorney applies only when the property has been seized and administrative proceedings have either been completed or are inapplicable.

B. In any event, Sections 1602-1604 impose only internal reporting requirements, without specifying any consequence for a violation. Accordingly, under principles recently reaffirmed in *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), and *Brock* v. *Pierce County*, 476 U.S. 253 (1986), a DEA agent's failure to report a drug violation "promptly" does not disable the government from filing a forfeiture action that is otherwise timely under the five-year statute of limitations in 19 U.S.C. 1621. The court of appeals' contrary view cannot be reconciled with *United States* v. *$8850*, 461 U.S. 555 (1983), and it would create incentives to conduct investigations with undue haste and lead to windfalls for drug offenders who have suffered no prejudice as a result of a DEA agent's failure to make a prompt internal report.

ARGUMENT

I. THE CONSTITUTION DOES NOT REQUIRE THAT THE SEIZURE OF REAL PROPERTY FOR FORFEITURE BE PRECEDED BY NOTICE AND AN OPPORTUNITY FOR A HEARING

A. Introduction

The court of appeals erred in holding that the seizure of the respondent property violated the Due Process Clause of the Fifth Amendment because claimant Good was not given notice and an opportunity to be heard prior to the seizure. In accordance with Justice Department policy governing seizures of real property, the government first obtained a warrant of seizure from a U.S. magistrate, based on a finding of probable cause to believe that the property was subject to forfeiture.[5] The seizure

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[5] In Directive No. 90-1 (Jan. 11, 1990), the Executive Office for Asset Forfeiture in the Office of the Deputy Attorney General instructed all U.S. Attorneys, U.S. Marshals, the Federal Bureau of Investigation, and the Drug Enforcement Administration that "[i]n all cases, Department of Justice officials shall obtain *ex parte* judicial approval prior to seizure of realty." *Id.* at 1. That policy does not apply where the owner has consented to the forfeiture (*e.g.*, in connection with a plea agreement), or where the federal government "adopts" for federal forfeiture property that previously was seized by state or local law enforcement agencies. *Id.* at 1 n.1. In Directive No. 90-10 (Oct. 9, 1990), the Executive Office for Asset Forfeiture stated (at 1-2) that prior judicial approval is not required for a warrant of arrest—which is issued by the district court clerk, see note 1, *supra*, and which in some circumstances may be served simply by posting it on the premises without further seizure, see *United States* v. *TWP 17 R 4, Certain Real Property in Maine*, 970 F.2d 984, 986 & n.4 (1st Cir. 1992) (warrant of arrest posted

therefore fully complied with the Fourth Amendment. The Due Process Clause required nothing more, because it is through the Fourth Amendment, not the Fifth, that the Constitution balances private interests against the public interest in conducting searches and seizures for forfeiture and other law enforcement purposes.

The due process claim is especially unmeritorious in this case because Good did not even occupy the premises at the time of the seizure, and he therefore was not personally deprived of possession. In addition—and again in accordance with Justice Department policy—Good's tenants were permitted to continue to occupy the premises during the pendency of the forfeiture proceeding. Compare *United States* v. *A Parcel of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1130 n.3 (1993) (plurality opinon) (owner of seized property permitted to remain in possession under an occupancy agreement).[6] As a

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on vacant land); Supp. Admir. R. E(4)(b)—because arrest alone, without further seizure, does not significantly interfere with the owner's possessory interest.

[6] Directive No. 90-10, discussed in note 5, *supra*, provides (at 2) that, "[a]s a general rule, occupants of real property seized for forfeiture should be permitted to remain in the property pursuant to an occupancy agreement pending forfeiture," if certain conditions are met: (a) the occupants agree to maintain the property in good repair or in the same condition as existed at the time of seizure, and to make any monthly payments to lienholders or monthly rent payments to the U.S. Marshal or his designee if the occupants are tenants; (b) the occupants agree not to engage in continued illegal activity; (c) the continued occupancy does not pose a danger to public health or safety or to law enforcement; (d) the continued occupancy does not adversely affect the

result, the seizure's only immediate consequence for Good was that his tenants were required to pay their monthly rent to the U.S. Marshal, to be held in escrow pending the outcome of the forfeiture proceedings. That temporary loss of the use of money *pendente lite* does not render the procedures used in this case constitutionally inadequate. This Court has repeatedly held that a claimant has no due process right to preseizure notice and an opportunity for a hearing, even when the forfeiture proceedings resulted in the temporary loss of the use of the property (including money). See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974); *United States* v. *$8850*, 461 U.S. 555, 562 n.12 (1983); *United States* v. *Von Neumann*, 474 U.S. 242, 249 n.7 (1986).[7]

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ability of the U.S. Marshal to manage the property; and (e) the occupants agree to allow the U.S. Marshal or his designee to make reasonable periodic inspections of the property with adequate and reasonable notice to the occupants. See also U.S. Marshals Service, Dep't of Justice, *Seized Asset Management: Guidelines and Procedures*, Ch. IV, at 7-8, 13-14, 16-17 (Oct. 1990). "Eviction of occupants of residential property will be accomplished only upon order of the U.S. district court having jurisdiction over the forfeiture action." *Id.* at 17.

[7] The decision below conflicts with *United States* v. *A Single Family Residence & Real Property Located at 900 Rio Vista Blvd.*, 803 F.2d 625, 631-632 (11th Cir. 1986), which held that due process permits the seizure of a residence even without a warrant. See also *United States* v. *Certain Real Estate Property Located at 4880 S.E. Dixie Highway*, 838 F.2d 1558, 1561-1562 (11th Cir. 1988). Other courts have held that notice and opportunity for a hearing are required prior to seizure of a residence. See *United States* v. *Premises & Real Property at 4492 S. Livonia Road*, 889 F.2d 1258 (1989), reh'g denied, 897 F.2d 659 (2d Cir. 1990); *United States* v. *A Parcel of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Ave.*, 937 F.2d 98, 101 (3d Cir. 1991) (dicta), aff'd on other grounds, 113 S. Ct. 1126 (1993); cf. *Richmond Tenants Org., Inc.* v. *Kemp*, 956 F.2d 1300 (4th Cir. 1992) (notice and hearing required prior to eviction of public housing tenants in connection with seizure for forfeiture of their leasehold interests).

Section 881(b) of Title 21 expressly authorizes the government to request issuance of a warrant authorizing seizure of property subject to forfeiture "in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure." The government followed that procedure in this case, seeking and obtaining a warrant based on an ex parte showing of probable cause, as provided in Fed. R. Crim. P. 41.[8] The court of appeals has effectively

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[8] Because the government obtained a seizure warrant, there is no need in this case to decide whether the Fourth Amendment required that procedure in order for the seizure to be reasonable. Cf. *Calero-Toledo*, 416 U.S. at 680 n.14. See *United States* v. *A Single Family Residence & Real Property Located at 900 Rio Vista Blvd.*, 803 F.2d at 631-632; *United States* v. *Distillery at Petersburg*, 25 F. Cas. 853 (C.C.E.D. Va. 1876) (No. 14,961) (seizure of distillery without warrant); see also *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 351-352, 354 (1977); *Payton* v. *New York*, 445 U.S. 573, 586-587 (1980); *Dobbins's Distillery* v. *United States*, 96 U.S. 395, 396-397 (1878) (seizure of distillery by executive officers; no mention of warrant); *United States* v. *Distillery at Spring Valley*, 25 F. Cas. 854, 855 (C.C.S.D.N.Y. 1873) (No. 14,963) (same); *United States* v. *Distillery, etc., of J.C. McCoy*, 25 F. Cas. 862 (D. Neb. 1869) (No. 14,964) (same); *United States* v. *Distillery in West Front Street*, 25 F. Cas. 866 (D. Del. 1870) (No. 14,965) (same); cf. *Segura* v. *United States*, 468 U.S. 796, 808-810 (1984) (opinion of Burger, C.J.); *Boyd* v. *United States*, 116 U.S. 616, 623 (1886).

Entry into premises to search for and seize forfeited goods presents different considerations under the Warrant Clause from those raised by the seizure of the premises themselves.

held that statutory authorization for seizures pursuant to such a warrant unconstitutional as applied to seizures of real property, or at least to seizures of a dwelling.[9]

B. The Fourth Amendment Permits Seizure Of Property Based On A Magistrate's Finding Of Probable Cause To Believe It Is Subject To Forfeiture

1. The Fourth Amendment protects against "unreasonable" seizures of property. Where, as here, a seizure is undertaken in conformity with a warrant that was issued on the basis of probable cause (and that was supported by oath or affirmation and particularly described the things to be seized), the seizure satisfies the reasonableness requirement of the Fourth Amendment. See *Illinois* v. *Rodriguez*, 497 U.S. 177, 184-185 (1990); *Maryland* v. *Buie*, 494 U.S. 325, 331 (1990); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989); *Welsh* v. *Wisconsin*, 466 U.S. 740, 748-749 (1984); *United*

See *G.M. Leasing Corp.*, 429 U.S. at 354; cf. *Carroll* v. *United States*, 267 U.S. 132, 149-153 (1925). The seizure warrant in this case authorized the agents to enter in order to inspect and photograph the premises and to ensure the condition of the premises and the absence of safety hazards. Where the in rem warrant does not contain such authorization, it is Justice Department policy to seek a writ of entry from the court for those purposes. See U.S. Marshals Service, Dep't of Justice, *Seized Asset Management: Guidelines and Procedures*, Ch. IV, at 11 (Oct. 1990).

[9] An Act of Congress is presumptively constitutional, and "[t]his deference to congressional judgment must be afforded even though the claim is that a statute Congress has enacted effects a denial of the procedural due process guaranteed by the Fifth Amendment." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319-320 (1985) (citing *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976), and *Schweiker* v. *McClure*, 456 U.S. 188 (1982)).

States v. *United States District Court*, 407 U.S. 297, 309-310 (1972); *United States* v. *Ventresca*, 380 U.S. 102, 105-107 (1965); *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948).

The decision in *United States* v. *Monsanto*, 491 U.S. 600 (1989), strongly supports the conclusion that no more than probable cause was necessary for the seizure. *Monsanto* was a criminal case in which the defendant was charged with directing a large-scale heroin distribution enterprise. In the indictment, the government sought forfeiture under 21 U.S.C. 853(a) of certain real property (including a house and apartment) that allegedly constituted the proceeds of the defendant's illegal activities. The government obtained a pretrial restraining order, pursuant to 21 U.S.C. 853(e), which barred the defendant from transferring his property prior to trial, in order to preserve the availability of the property for forfeiture if he was convicted. In addition to rejecting the defendant's contention that the pretrial restraining order violated the Sixth Amendment because it prevented him from using his assets to hire a lawyer, the Court explicitly held "that assets in a defendant's possession may be restrained in the way they were here based on a finding of probable cause to believe that the assets are forfeitable." 491 U.S. at 615. The Court explained that it had "previously permitted the Government to seize property based on a finding of probable cause to believe that the property will ultimately be proved forfeitable" (*ibid.* (citing *$8850* and *Calero-Toledo*)), and it noted that "[h]ere, where respondent was not ousted from his property, but merely restrained from disposing of it, the governmental intrusion was even less severe than those permitted by our prior decisions." 491 U.S. at 615.

"Indeed," the *Monsanto* Court continued, "it would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent's possession, based on a finding of probable cause, when we have held that (under appropriate circumstances), the Government may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense." 491 U.S. at 615-616 (citing *United States* v. *Salerno*, 481 U.S. 739 (1987)).[10] The Court concluded that the property could be subject to a similar pretrial restraint to assure its "appearance" at trial and to "protect the community's interest in full recovery of any ill-gotten gains." 491 U.S. at 616.

The parallel to seizure of a person is even closer here than it was in *Monsanto*, because in civil in rem forfeiture proceedings, the property itself is the defendant. *Calero-Toledo*, 416 U.S. at 680-686; see also *J.W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U.S. 505, 510-511 (1921); *Dobbins's Distillery*, 96 U.S. at 399-401, 403-404. The defendant property therefore at least should be subject to seizure in the same manner as the defendant individual in a criminal prosecution. And so it was in this case. The property was seized (pursuant to a warrant) on the basis of probable cause, but it was "released" to Good's tenants pending trial of the forfeiture action.[11] The occupancy arrangement with the tenants served the same purpose as bail—namely, to regulate custody of the defendant property pending trial

[10] See also *Gerstein* v. *Pugh*, 420 U.S. 103, 111-119 (1975); *Baker* v. *McCollan*, 443 U.S. 137, 142-143 (1979); *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661, 1667-1668 (1991).

[11] See also *$8850*, 461 U.S. at 569 (discussing ways in which claimant may obtain hearing after seizure).

and to secure the presence of the defendant at trial. See *Distillery, etc., of J.C. McCoy*, 25 F. Cas. at 862 (seized distillery "released on bond").

For the foregoing reasons, there is no reason in this setting to depart from "the general rule under the Fourth Amendment * * * that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances)." *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 63 (1989); see note 15, *infra*.

2. The Court in *Monsanto* observed in a footnote that it did not have to consider whether the Due Process Clause required a hearing before the pretrial restraining order was imposed in those proceedings, since the Second Circuit had ordered that such a hearing be held and the district court had already conducted the hearing. 491 U.S. at 615 n.10. It would, however, be a striking departure from both the text of the Fourth Amendment and historical practice to require an adversarial hearing on the question of probable cause to support the issuance of a warrant by a magistrate. Warrants authorizing the search and seizure of property have traditionally been based on an ex parte showing of probable cause. The text of the Fourth Amendment explicitly endorses that practice, for it requires only that probable cause be "supported by Oath or affirmation." See *Franks* v. *Delaware*, 438 U.S. 154, 164-165, 168-169, 171 (1978).

Once again, the procedures permitted by the Fourth Amendment for seizure and detention of a person are instructive. In *Gerstein* v. *Pugh*, the Court held that although the Fourth Amendment requires a judicial determination of probable cause as a pre-

requisite to extended restraint of liberty following arrest, 420 U.S. at 111-116, an adversary hearing is not required, *id.* at 119-122. The Court noted that probable cause to believe that the defendant has committed an offense "can be determined reliably without an adversary hearing" and "traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony," *id.* at 120; accord *Baker* v. *McCollan*, 443 U.S. 137, 143 & n.2 (1979). There is no reason for a different rule in the setting of this case, where the question is whether there is probable cause to believe that the "suspect" property was used to facilitate the commission of a drug offense.

This conclusion is strongly supported by the standards that govern the adjudication of a civil forfeiture case on the merits. The government makes out a prima facie case by establishing probable cause for the institution of the action. The burden then shifts to the claimant to prove by a preponderance of the evidence that the property was not used to commit a drug offense or that he is an innocent owner. See 19 U.S.C. 1615.[12] Moreover, it is well settled that the government may establish the probable cause necessary to make out its prima facie case on the basis of an affidavit, such as that submitted by the DEA agent in this case.[13] Thus, the submission to

[12] These principles date from the earliest history of the Nation. See Act of July 31, 1789, § 27, 1 Stat. 43-44; *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 366 (1842); *Taylor* v. *United States*, 44 U.S. (3 How.) 197, 211 (1845).

[13] See *United States* v. *$250,000 in United States Currency*, 808 F.2d 895, 897-900 (1st Cir. 1987); *United States* v. *228 Acres of Land & Dwelling Located on Whites Hill Rd.*, 916 F.2d 808, 814 (2d Cir. 1990), cert. denied, 111 S. Ct. 972 (1991); *Livonia Road*, 889 F.2d at 1267-1268; *United States* v. *Parcel of Real Property Known As 6109 Grubb Rd.*, 886 F.2d 618, 621-622 (3d Cir. 1989); *United States* v. *One Parcel of Real Estate Located at 7715 Betsy Bruce Lane*, 906 F.2d 110, 111-113 (4th Cir. 1990); *United States* v. *1964 Beechcraft Baron Aircraft*, 691 F.2d 725, 728 (5th Cir. 1982), cert. denied, 461 U.S. 914 (1983); *United States* v. *Premises Known as 526 Liscum Drive*, 866 F.2d 213, 217 n.3 (6th Cir. 1989); *United States* v. *One 1982 Chevrolet Corvette*, 976 F.2d 392, 392-393 (8th Cir. 1992) (per curiam); *United States* v. *One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1283 (9th Cir. 1983); *Nnadi* v. *Richter*, 976 F.2d 682, 686-687 (11th Cir. 1992).

the magistrate in this case not only established sufficient grounds for issuance of the warrant for seizure of the property pending entry of final judgment; it also made out a prima facie case on the merits and entitled the United States to a final judgment of forfeiture unless Good affirmatively rebutted that showing or established the innocent owner defense, which he failed to do. If, as this Court held in *Gerstein* v. *Pugh*, an adversary hearing is not required on the issue of probable cause to restrain the defendant in a criminal prosecution, in which the standard of proof is proof beyond a reasonable doubt, it follows *a fortiori* that an adversary hearing is not required on the issue of probable cause to restrain property pending completion of civil forfeiture proceedings, in which probable cause suffices to shift the burden of proof to the claimant and the ultimate question of forfeiture is governed by a preponderance-of-the-evidence standard.

To be sure, as the Second Circuit pointed out in *United States* v. *Premises & Real Property at 4492 S. Livonia Road*, 889 F.2d 1258 (1989), this Court has enforced the Fourth Amendment with particular

firmness in the context of the search of a house. See 889 F.2d at 1264 (citing *Payton* v. *New York*, 445 U.S. 573, 590 (1980), and *United States* v. *Karo*, 468 U.S. 705, 714 (1984)).[14] But as those very cases show, the Court has done so by insisting upon compliance with the Warrant Clause of that Amendment. See *Payton*, 445 U.S. at 586-603; *Karo*, 468 U.S. at 714-718. Nothing in the Fourth Amendment or this Court's decisions construing it suggests that procedures *beyond* those required by the Warrant Clause are required for the search or seizure of a house. To the contrary, the Amendment's first clause speaks of the people's right to be secure in their "houses" against unreasonable searches and seizures in the same terms as it speaks of their right to be secure in their "persons, * * * papers, and effects," and its second clause furnishes heightened protection for "houses" through its provision for a warrant.

The procedural protections the Framers of the Fourth Amendment deemed necessary to guard against arbitrary or erroneous searches and seizures pursuant to a warrant are furnished by the further requirements that the warrant application be more than "bare bones" and be supported by "[s]ufficient

[14] Indeed, the Second Circuit has declined to apply the pre-seizure adversary hearing requirement of *Livonia Road* to the seizure of rental or commercial property. *United States* v. *141st Street Corp.*, 911 F.2d 870, 874-876 (1990), cert. denied, 111 S. Ct. 1017 (1991). Under *141st Street*, the decision in *Livonia Road* should not apply here, because Good no longer used the property as his personal residence at the time of the seizure. But cf. *United States* v. *All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896 (2d Cir. 1992) (following *Livonia Road* in connection with seizure of business premises where seizure resulted in closing of business).

information" to furnish a basis for determining probable cause (*United States* v. *Leon*, 468 U.S. 897, 915 (1984)); that such information be submitted under "Oath or affirmation," and therefore be accepted by the affiant as true (*Franks* v. *Delaware*, 438 U.S. at 165); that the submission be approved by the "prior judicial judgment" of a neutral and detached magistrate (*United States* v. *United States District Court*, 407 U.S. at 317 & n.18); that the warrant be supported by probable cause, so that there is a "substantial basis" for any ensuing search or seizure (*Illinois* v. *Gates*, 462 U.S. 213, 236 (1983)); and that any warrant issued on the basis of the submission particularly describe the place to be searched and the things to be seized, so that the search or seizure "will be carefully tailored to its justifications" (*Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987)). The courts have no authority to append a further requirement—a prior adversary hearing regarding the propriety of the warrant—onto the Fourth Amendment.[15]

[15] The rule is otherwise "when materials presumptively protected by the First Amendment are involved"; in that situation, an adversary hearing is required prior to seizure of materials to destroy them or block their distribution. *Fort Wayne Books*, 489 U.S. at 62-64. That special rule, however, derives from the unique protections against prior restraint under the First Amendment. *Id.* at 63-64 (quoting *Maryland* v. *Macon*, 472 U.S. 463, 470 (1985)). This case, by contrast, does not involve a subject matter that is afforded special protection under another constitutional amendment. The protection of houses against unreasonable searches and seizures is instead furnished by the Fourth Amendment itself.

C. The Due Process Clause Does Not Require Notice And An Opportunity For A Hearing Prior To A Seizure Of Property That Satisfies Fourth Amendment Standards

The court of appeals did not suggest that the seizure of the respondent property in this case violated the Fourth Amendment. In fact, it did not even mention that Amendment. Instead, invoking modern decisions of this Court in civil cases outside the context of law enforcement and forfeiture, the court of appeals relied on the Due Process Clause in holding that the seizure in this case was unconstitutional because Good was not given notice and an opportunity for a hearing before the seizure. Pet. App. 13a-16a (discussing *Mathews* v. *Eldridge* and *Fuentes* v. *Shevin*). Contrary to the court of appeals' view, however, the Due Process Clause imposes no procedural requirements beyond those prescribed by the Fourth Amendment in this setting.

1. The fundamental purpose of the warrants to which the Fourth Amendment refers is to vest authority in the executing officers to search the place and seize the property specified in the warrant. Nothing in the general terms of the Due Process Clause suggests that a seizure that the Constitution itself deems "reasonable"—and that is undertaken pursuant to authority constitutionally vested in the seizing officers by the warrant—is nevertheless unconstitutional because of a failure to afford the owner prior notice and an opportunity for a hearing. It is through the Fourth Amendment that the Framers of the Bill of Rights struck a balance between the people's security in their persons, houses, papers, and effects and the public interest in effecting searches and seizures for law enforcement purposes. *Zurcher*

v. *Stanford Daily*, 436 U.S. 547, 559 (1978); see also *Maryland* v. *Buie*, 494 U.S. at 331; *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. at 619; *United States* v. *United States District Court*, 407 U.S. at 314-315. There is "no occasion or justification" for a court to "strike a new balance" by denying a warrant or invalidating a seizure unless further procedural prerequisites, not required by the Fourth Amendment, are met. See *Stanford Daily*, 436 U.S. at 559.

Put another way, because the Fourth Amendment specifically regulates the seizure of property by the government for law enforcement purposes (including forfeiture), compliance with the standards and procedures prescribed by the Fourth Amendment constitutes all the "process" that is "due" to the claimant under the Fifth Amendment. The Court made that very point in *Gerstein* v. *Pugh* with respect to procedures for detaining a criminal defendant pending trial (420 U.S. at 125 n.27):

> The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial.

See also *Baker* v. *McCollan*, 443 U.S. at 143-146 (arrest and detention of suspect on the basis of warrant supported by probable cause, which satisfies the Fourth Amendment, "is entirely consistent with 'due

process of law' "); *G.M. Leasing Corp.*, 429 U.S. at 352 n.18.[16]

Similarly, in *Graham* v. *Connor*, 490 U.S. 386, 394-395 (1989), the Court held that the Fourth Amendment, rather than the Due Process Clause, is the source of any specific limitations on the use of force in seizing a person. The Court reasoned that because the "reasonableness" standard of the Fourth Amendment "provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."

[16] In support of its holding in *G.M. Leasing Corp.* that a warrant was not necessary to seize automobiles in open places to secure payment of taxes, the Court first relied on the holding in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 285-286 (1856), that a warrant was not necessary to seize a debtor's land in satisfaction of a claim of the United States. 429 U.S. at 351-352. The Court then stated (*id.* at 352 n.18 (emphasis added)):

> In *Phillips* v. *Commissioner*, 283 U.S. 589, 596-597 (1931), the Court rejected a constitutional challenge to the statutory system under which taxes may be collected summarily without a pre-seizure judicial hearing. It was held that as long as there was an adequate opportunity for post-seizure determination of the taxpayer's rights, the statute met the requirements of due process. See *Commissioner* v. *Shapiro*, 424 U.S. 614, 630-633 (1976); *Fuentes* v. *Shevin*, 407 U.S. 67, 91-92 (1972). These cases, of course, center upon the Due Process Clause rather than the Fourth Amendment, *but the constitutional analysis is similar and yields a like result.* It is to be noted that the Court in *Phillips*, 283 U.S., at 596, cited *Murray's Lessee* with approval as a case which sustained proceedings "more summary in character" and "involving less directly the obligation of the taxpayer."

Id. at 395. So here, the warrant and reasonableness requirements of the Fourth Amendment furnish an "explicit textual source of constitutional protection" for the "physically intrusive governmental conduct" involved in the seizure of a house, and that Amendment, not the more "generalized notion" of procedural due process, must be the guide for analyzing Good's claim of a right to additional procedural measures.

2. In addition to the foregoing cases that address the relation of the Fourth and Fifth Amendments generally, the Court has already specifically held that "seizure for purposes of forfeiture is one of those '"extraordinary situations" that justify postponing notice and opportunity for a hearing.'" *Calero-Toledo*, 416 U.S. at 677 (quoting *Fuentes* v *Shevin*, 407 U.S. at 90). The Court relied on three considerations: (1) the seizure served significant purposes, because it permitted the government to assert *in rem* jurisdiction, prevent illicit use of the property, and enforce the drug laws; (2) preseizure notice and hearing might frustrate the interests served by the statutes, because the property seized will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed if advance warning were given; and (3) unlike in *Fuentes* v. *Shevin*, the seizure was initiated not by interested private parties, but by government officials. 416 U.S. at 679.[17]

[17] As the Court also noted in *Calero-Toledo*, 416 U.S. at 679 n.14, *Fuentes* itself had distinguished a seizure under a search warrant from a seizure under a writ of replevin, on the grounds (1) that a search warrant is generally issued to serve highly important governmental needs and "is generally issued in situations demanding prompt action," and

The same considerations are applicable in this case. Here, as in *Calero-Toledo*, seizure furnishes a basis for the government "to assert *in rem* jurisdiction over the property to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions." 416 U.S. at 679; see also *Republic National Bank* v. *United States*, 113 S. Ct. 554, 557 (1992).[18] Moreover, "unlike the situation in *Fuentes*, seizure is not initiated by self-interested private parties; rather, [government] officials deter-

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(2) that the Fourth Amendment guarantees that the government will not relinquish control over seizures to private parties and that a warrant will not issue except upon probable cause. 407 U.S. at 93-94 n.30.

[18] This Court has stated that prior seizure of the premises by executive officials is necessary for institution of forfeiture proceedings. *Dobbins's Distillery*, 96 U.S. at 396; see also 1 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 9.01[2], at 9-4 to 9-7 (1992). It appears, however, that at least in some circumstances, a court may acquire bare jurisdiction over the defendant real property simply through issuance and service of an in rem warrant of arrest. See *TWP 17 R 4, Certain Real Property in Maine*, 970 F.2d at 986, 989. Where service of such a warrant requires nothing more than posting it on the premises, no conceivable due process issue could arise. See *id.* at 989-990. However, seizure ordinarily would be necessary for the court to acquire and exercise meaningful custody over the premises and to ensure against its continued use for illegal purposes. See generally 1 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 9.01[4], at 9-9 to 9-16 (1992). For these reasons, and because some form of physical seizure has historically preceded or accompanied the institution of forfeiture proceedings, the first factor identified in *Calero-Toledo* is equally applicable to seizures of real property.

mine whether seizure is appropriate under the provisions of the [federal] statutes." 416 U.S. at 679.[19]

The court of appeals sought to distinguish *Calero-Toledo* on the ground that there the property was moveable, while here it is not. Pet. App. 14a-15a. The Court in *Calero-Toledo*, however, simply identified, as one of the three relevant factors, that "preseizure notice and hearing might frustrate the interests served by the [forfeiture] statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." 416 U.S. at 679. The Court did not suggest that it was necessary for the government to show that removal, concealment, or destruction of the property was likely in a particular case before seizure would be justified without prior notice and a hearing; it simply observed that property subject to forfeiture "will often be of a sort" that raises those concerns. Compare *Segura*, 468 U.S. at 807 (opinion of Burger, C.J.); *Chambers* v. *Maroney*, 399 U.S. 42, 51-52 (1970). The Court thus stated a categorical rule in *Calero-Toledo*, based on the characteristics of forfeited property generally. Moreover, the Court did not mention only the possibility of removal of the property; it also observed that property could be "destroyed" or "concealed." A residence, just like a yacht, can be "destroyed," and its

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[19] These factors also distinguish *Connecticut* v. *Doehr*, 111 S. Ct. 2105 (1991), on which respondent relies (Br. in Opp. 8). Moreover, unlike in *Doehr*, where the plaintiff had no interest in the real estate when he sought the attachment (see 111 S. Ct. at 2115), the United States here had an interest in the property itself as a result of Good's use of it to commit a drug offense.

contents (which may also be subject to forfeiture if used in, or the proceeds of, a drug transaction) can be "concealed." Other governmental interests also weigh against a special rule for real property, including possible danger to the seizing agents if the owner or occupant is tipped off in advance, and the owner's use of a hearing to obtain discovery (including disclosure of the identity of informants) in a parallel criminal investigation or trial.[20]

The conclusion that *Calero-Toledo* addresses seizures of property for forfeiture purposes on a categorical basis also is supported by the Court's subsequent decisions in *$8850* and *United States* v. *Von Neumann*, 474 U.S. 242 (1986). In *$8850*, the claimant conceded that the government was not constitutionally required to afford her an opportunity for a hearing before it seized the property for forfeiture under the customs laws. 461 U.S. at 562. The Court observed in a footnote that the general rule is that in the absence of an "extraordinary situation," a party may not invoke the power of the State to seize a person's property without a prior judicial determination that the seizure is justified. Significantly, however, the Court stated that it "ha[d] previously held that such an extraordinary situation exists when the government seizes items subject to forfeiture." *Id.* at 562 n.12 (citing *Calero-Toledo*). The Court then added that *Calero-Toledo* "clearly indicates that due process does not require federal customs officials to conduct a hearing before seizing items subject to forfeiture," and that the governmental

[20] It also is significant that in *Calero-Toledo*, both the owner and the lessee were entirely dispossessed of the yacht during the forfeiture proceedings. Here, by contrast, Good's tenants remained in possession of the premises.

interests found decisive in *Calero-Toledo*—including that "preseizure notice might frustrate the statutory purpose"—were equally present in the customs setting. *Ibid.* The Court reiterated the same point in *Von Neumann*, 474 U.S. at 249 n.7. Although the property at issue in both *$8850* and *Von Neumann* was moveable, the Court did not rely on or even mention that fact in its discussion of the preseizure due process issue.

3. The court of appeals' ruling that due process requires preseizure notice and an opportunity for a hearing is without merit even if it is appropriate to apply the "flexible" balancing test of *Mathews* v. *Eldridge* in this setting. The Court identified three relevant factors in *Mathews* v. *Eldridge* (424 U.S. at 335):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

All three of these factors support the constitutionality of the seizure in this case.

a. The private interest in this case does not justify an extraordinary departure from established Fourth Amendment procedures. As we have noted, although the court of appeals relied on the notion that a person's home warrants special constitutional protection, Pet. App. 14a-15a, the respondent property was not Good's home at the time of the seizure. Moreover, in accordance with Justice Department policy (see note

6, *supra*), Good's tenants were permitted to continue to reside on the premises pending the outcome of the forfeiture proceedings. As a result of that policy, even where the residence is occupied by the owner, the only real change wrought by the typical seizure is that the owner's continued occupancy is subject to an agreement that recognizes the United States' interests in protecting its claim to the property and obligates the owner, *inter alia*, to maintain the property and refrain from making illegal use of it. In this case, the only immediate consequence for Good was that rent payments were to be made to the U.S. Marshal to be held in escrow, rather than to Good—a consequence no different from the loss of the use of cash in *$8850*, which this Court held did not require prior notice and an opportunity for a hearing.

b. The court of appeals made no attempt to assess either the "risk of an erroneous deprivation" under the warrant procedure utilized in this case or the "probable value, if any," of an adversary hearing. In *Gerstein* v. *Pugh*, this Court addressed those considerations in the context of seizures of a person pending trial, which are governed by the same legal standard—probable cause—that governs here. The existence of probable cause, the Court concluded, "can be determined reliably without an adversary hearing" and "traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony." 420 U.S. at 120. The Court explained:

> The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.

Id. at 121-122 (footnote and citation omitted).

If such procedures are constitutionally sufficient where loss of liberty is involved, it should follow *a fortiori* that they are sufficient in this case. In fact, in the very line of due process cases of which *Fuentes* v. *Shevin* and *Mathews* v. *Eldridge* are a part, the Court has indicated in a variety of contexts that a determination of probable cause by a neutral judicial officer, on the basis of an adequate affidavit, will suffice for due process purposes. See *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 612, 615-618 (1974); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 606-608 (1975); *Commissioner* v. *Shapiro*, 424 U.S. 614, 629-630 & nn. 11-12, 633-634 (1976);[21] cf. *Connecticut* v. *Doehr*, 111 S. Ct. 2105,

[21] In *Shapiro*, the Court held that the government's interest in collecting the revenue "is clearly sufficient to justify seizure of a taxpayer's assets without a *pre*seizure hearing," 424 U.S. at 630 n.12 (citing *Fuentes* v. *Shevin*; see 407 U.S. at 91-92), but held that a post-seizure, probable cause-type inquiry was appropriate where the taxpayer alleged irreparable injury.

2112, 2114 (1991); *Bell* v. *Burson*, 402 U.S. 535, 540 (1971); see also *FDIC* v. *Mallen*, 486 U.S. 230 (1988) (sustaining statute providing for suspension of bank director upon grand jury's finding of probable cause). Indeed, the Court suggested as much in *Mathews* v. *Eldridge* itself. See 424 U.S. at 334.

The validity of that procedure here is further supported by the "nature of the relevant inquiry," *Mathews* v. *Eldridge*, 424 U.S. at 343, in a forfeiture case. A showing of probable cause on the basis of the affidavit of the DEA agent was sufficient not only to justify the seizure, but also to meet the government's initial burden on the merits of the forfeiture action, and thereby to shift to Good the burden of showing by a preponderance of the evidence that the property was not subject to forfeiture. Surely seizure should be permitted where the government has established the elements of its prima facie case. Cf. *Samuels* v. *McCurdy*, 267 U.S. 188, 200 (1925).[22]

c. The governmental interests involved also strongly support the adequacy of the procedures utilized in this case. By operation of 21 U.S.C. 881, the government itself claims title to the property, compare

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[22] It is difficult to fathom what purpose would have been served by a prior adversary hearing in this case in any event. Good had pleaded guilty in state court to the drug offenses that gave rise to the forfeiture, and the warrant application was supoprted by an affidavit describing the evidence seized from the house by state law enforcement officers during the search that led to the state prosecution. See page 3, *supra*. Not surprisingly, when the case was resolved on the merits Good failed to produce contrary evidence to defeat the government's motion for summary judgment based on that submission.

Connecticut v. *Doehr*, 111 S. Ct. at 2115, and it has a strong interest in protecting the property, see *W.T. Grant Co.*, 416 U.S. at 608-609; *Calero-Toledo*, 416 U.S. at 679, and in preventing its use for illegal purposes, *Calero-Toledo*, 416 U.S. at 679. "Historical and contemporary practice support our analysis" as well, *Connecticut* v. *Doehr*, 111 S. Ct. at 2115, because property has traditionally been seized for forfeiture on the basis of, at most, an ex parte determination of probable cause. Only the most persuasive empirical showing that this long-established procedure, sanctioned by the Fourth Amendment, is inadequate would justify judicial imposition of costly and burdensome new procedures, such as an adversary hearing. No showing even remotely approaching that level was made below. The court of appeals' due process ruling therefore should be reversed.

II. THE "PROMPTNESS" PROVISIONS OF THE CUSTOMS STATUTES DO NOT FURNISH A BASIS FOR DISMISSAL OF THIS SUIT

The court of appeals also erred in imposing a "promptness" obligation—judicially enforceable through the sanction of dismissal—on the institution of forfeiture proceedings, even though the forfeiture action was filed within the five-year limitations period in 19 U.S.C. 1621. See Pet. App. 4a-12a. The relevant provisions of the customs laws on which the court of appeals relied in reaching that unprecedented result do not address the timing of referrals to the Attorney General for institution of forfeiture proceedings when the property has not been seized. Moreover, those provisions impose only "internal" notification and reporting requirements on Executive Branch officials, Pet. App. 5a; they do not furnish a statutory basis for dismissal of a forfeiture action.

The court of appeals' ruling to the contrary threatens uncertainty and disruption in the enforcement of federal drug, customs, and other laws.

A. The Customs Laws Require "Prompt" Reporting To The Attorney General For Institution Of Forfeiture Proceedings Only When The Property Has Already Been Seized And Administrative Proceedings Are Unavailable Or Have Been Completed

In remanding to the district court to determine whether this action should be dismissed as untimely, the court of appeals relied on 19 U.S.C. 1602-1604 (as made applicable by 21 U.S.C. 881(d)), and particularly 19 U.S.C. 1603(b). See Pet. App. 4a-12a. Contrary to the ruling of the court of appeals, the requirement in Section 1603(b) to report "promptly" to the United States Attorney arises where both of the following conditions are met: (1) there has been a seizure or a "violation of the customs laws is discovered," *and* (2) "legal proceedings by the United States attorney in connection with such seizure or discovery are required." The court of appeals erroneously believed that a report is necessary if the former condition alone is met. See Pet. App. 9a.

In the forfeiture context, where a violation of customs (or drug) laws has been discovered, judicial proceedings are not "required" unless and until the property has been seized and administrative forfeiture proceedings are either unavailable or have been completed. See 19 U.S.C. 1607-1610.[23] Once the

[23] Under current customs law, property valued at $500,000 or less, as well as monetary instruments and conspicuous drug-carrying conveyances, regardless of value, may be forfeited administratively. See 19 U.S.C. 1607, 1609 (1988 & Supp. III 1991). Where such property is involved, the Customs Service furnishes notice of its intent to forfeit the property. 19 U.S.C. 1607; 19 C.F.R. 162.31. Within 20 days, a claimant must file a cost bond with respect to any interest the claimant wishes to assert in the subject property. The Customs Service then must notify the U.S. Attorney of the claim. 19 U.S.C. 1608; 19 C.F.R. 162.47(a), (b) and (d). If no notice and bond are filed, the property is forfeited administratively. 19 U.S.C. 1609(a). Remission or mitigation of the forfeiture may also obviate any need for judicial proceedings. See *$8850*, 461 U.S. at 557-558, 566. Where the property is not subject to administrative forfeiture, judicial proceedings are necessary and the Customs Service must refer the matter to the U.S. Attorney. 19 U.S.C. 1610; 19 C.F.R. 162.49. Similar regulations govern forfeiture of property seized by the Justice Department under the drug laws and other statutes. See 21 C.F.R. 1316.75-1316.79; 28 C.F.R. 8.7-8.10. Under current Justice Department policy, real property is not forfeited in administrative proceedings.

In the non-forfeiture context, legal proceedings likewise would not ordinarily be "required" under 19 U.S.C. 1603(b) following discovery of a violation of the law until, for example, after administrative proceedings for assessment of a penalty (or for other purposes) have been completed.

latter steps have occurred, legal proceedings in court are required both to "perfect" the title to the property that the government has asserted by seizing the property, *92 Buena Vista Ave.*, 113 S. Ct. at 1134-1137 (opinion of Stevens, J.), and to provide an opportunity for a post-seizure hearing, as required by the Due Process Clause under *$8850*. Prior to that time, however, no provision of the Constitution or laws of the United States independently "requires" that judicial proceedings be instituted.

This reading of 19 U.S.C. 1603 is confirmed by its history. Early in the Nation's history, all forfeiture cases proceeded judicially, with the res coming within the court's jurisdiction by issuance of the warrant of arrest in rem. See, e.g., *Ex parte Hoyt*, 38 U.S.

(13 Pet.) 279 (1839); *Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 496 (1832). Subsequently, however, the Secretary of the Treasury was given authority to forfeit certain property administratively and to remit or mitigate forfeitures.[24] Because of these provisions for administrative disposition, Congress in 1938 amended Section 603 of the Tariff Act of 1930, 19 U.S.C. 1603, to provide for reporting to the U.S. Attorney only when judicial proceedings were required, and by deleting a provision requiring that such reports be made promptly. Act of June 25, 1938, § 27, 52 Stat. 1089; see H.R. Rep. No. 1429, 75th Cong., 1st Sess. 5 (1937); S. Rep. No. 1465, 75th Cong., 3d Sess. 11 (1938).[25] In 1978, Congress reinserted the word "promptly" in the reporting provision. Pub. L. No. 95-410, § 110(b), 92 Stat. 896. But Congress retained the condition that reports need be made only when judicial proceedings are "required" —a matter that cannot be ascertained until the agency has seized the property in question and administrative proceedings for forfeiture or remission

[24] In 1844, Congress first provided for administrative forfeiture of unclaimed goods. Act of Apr. 2, 1844, § 1, 5 Stat. 653. In 1874, Congress provided for petitions for remission or mitigation to be considered by the Secretary of the Treasury after they were first filed and inquired into by the district court. Act of June 22, 1874, §§ 17-19, 18 Stat. 189-190. In 1922, Congress provided for such petitions to be filed directly with the Secretary. Act of Sept. 21, 1922, § 618, 42 Stat. 987-988.

[25] See *Customs Administrative Bill: Hearings on H.R. 6738 Before the House Comm. on Ways and Means*, 75th Cong., 1st Sess. 138 (1937) (Treasury Department section-by-section analysis) ("Since legal proceedings are not necessary in connection with many seizures, it is proposed to require reports to be so made to the United States attorneys only in cases in which legal proceedings are required.").

or mitigation of forfeiture are completed or found to be inapplicable.[26] Because those steps were not completed here, the reporting duty imposed by 19 U.S.C. 1603 was never triggered.

B. 19 U.S.C. 1602-1604 Impose Only "Internal" Reporting Requirements And Do Not Confer A Right On A Claimant To Have A Forfeiture Action Dismissed If Those Requirements Are Not Met

Even if the reporting requirement in 19 U.S.C. 1603 was triggered in this case, the failure by the responsible DEA agents to report Good's violation "promptly" to the U.S. Attorney (should the district court find such a failure on remand) would not give rise to a right on Good's part to have the forfeiture action dismissed.

"[M]any statutory requisitions intended for the guide of officers in the conduct of business devolved upon them . . . do not limit their power or render its exercise in disregard of the requisitions ineffectual." *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-718 (1990) (quoting *French* v. *Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872)). For that reason, "[t]here is no presumption or general rule" that for every duty imposed upon the government, there must exist some punitive sanction for departures or omissions. *Montalvo-Murillo*, 495 U.S. at 717. To the contrary, federal statutory provisions imposing procedural duties on federal officials must be construed to conform to the "great principle of public policy * * * which forbids that the public

[26] See H.R. Rep. No. 621, 95th Cong., 1st Sess. 17 (1977) (explaining the purpose of the 1978 addition of "promptly" as being to ensure the availability of judicial review once administrative proceedings have been completed).

interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Id.* at 718 (quoting *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986), and *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886)); see also *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 66 (1984); *id.* at 93 (O'Connor, J., concurring in part and dissenting in part); *United States* v. *Morgan*, 222 U.S. 274, 281-282 (1911). Accordingly, such provisions should not be construed in a manner that would "disarm the Government of a power which has been confided to it to be used for the general good * * * unless plain and express words indicate[] that such was the intention of the Legislature." *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 195 (1857).[27]

1. The foregoing principles require rejection of the court of appeals' notion that a district court may order dismissal of a forfeiture action if it concludes that the vague standards of dispatch in 19 U.S.C. 1602-1604 were not satisfied. The customs laws (which are incorporated by reference into 21 U.S.C. 881(d)) furnish protection to private persons from undue delay by the government in instituting forfeiture proceedings in the usual manner in which the law

[27] Application of that rule in this case is reinforced by the principle that suits by the United States are not time-barred unless Congress clearly manifests its intention to that effect, *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938); *United States* v. *Wurts*, 303 U.S. 414, 415-416 (1938); *E.I. duPont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924); *United States* v. *St. Paul, M. & M. Ry.*, 247 U.S. 310, 314 (1918); *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. at 125, and that statutes of limitations that do apply to the government are to be strictly construed in its favor, *Badaracco* v. *Commissioner*, 464 U.S. 386, 391 (1984); *E.I. duPont de Nemours & Co.* v. *Davis*, 264 U.S. at 462.

affords protection against stale claims—through a statute of limitations. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 (1977). Thus, 19 U.S.C. 1621 provides that "[n]o suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered." That statute of limitations unquestionably confers an enforceable right on a person claiming an ownership interest in property against which the United States has brought a forfeiture action, and it may be pleaded by the claimant as an affirmative defense in answering the government's forfeiture complaint. See Fed. R. Civ. P. 8(c); see also 28 U.S.C. 2462.

There is no reason to believe that Congress intended 19 U.S.C. 1602-1604 to confer an additional right on a claimant to have a forfeiture action dismissed, even if the action was brought within the five-year limitations period under 19 U.S.C. 1621. Congress "specified no consequences for the failure" to comply with the promptness requirements in Sections 1602-1604. See *Brock* v. *Pierce County*, 476 U.S. at 259. Especially when juxtaposed against the clear time limit imposed by 19 U.S.C. 1621 for the benefit of property owners and other private persons, the most natural reading of the quite different provisions in 19 U.S.C. 1602-1604 is that they are internal housekeeping measures designed to regulate (and promote expedition in) the conduct of government personnel for the benefit of the government. In fact, the court of appeals in this case acknowledged that those provisions "establish a series of internal notification and reporting requirements." Pet. App. 5a. If Congress had intended 19 U.S.C. 1602-1604 to constitute the equivalent of a Speedy Trial Act, "one

would suppose that Congress would have set some specific deadlines, as it did in the Speedy Trial Act itself. 18 U.S.C. § 3164-74. Here there are simply generalities—'immediately' to inquire, 'forthwith' to commence prosecution, to prosecute 'without delay.'" *United States* v. *Laurenti*, 581 F.2d 37, 43 (2d Cir. 1978), cert. denied, 440 U.S. 958 (1979)).

That interpretation is supported by the background of 19 U.S.C. 1602-1604. Language requiring customs officials to proceed "without delay" appeared in statutes governing civil penalties for customs violations at least as early as 1799. See Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 695-696; *Stockwell* v. *United States*, 80 U.S. (13 Wall.) 531, 542-543 (1871). As one commentator has observed:

> The great antiquity of the language indicates that its purpose was not to protect "due process rights" that were as yet undreamt, but rather to insure that federal customs revenues were collected in a timely fashion. This was absolutely essential because such duties "constituted the principal source of federal revenues from 1789 until World War I."
>
> Since the purpose of the promptness language in sections 1602 and 1604 is to protect the fisc rather than claimants' due process rights, these statutes also do not provide claimants with a non-constitutional basis for raising a delay defense.

1 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 12.01[5][b], at 12-27 to 12-28 (1992) (quoting *Laurenti*, 581 F.2d at 41 & n.12). It would be inconsistent with the purpose of promoting the government's financial interests to recognize a personal right in a claimant to require dismissal of the government's action to recover a forfeiture or penalty simply because the government's own agents did not move with sufficient dispatch on its behalf *wthin* the time allowed by the statute of limitations.[28]

Finally, a construction of 19 U.S.C. 1602-1604 that supported dismissal of a forfeiture action would create incentives to investigate possible violations of the law with undue haste, to the disadvantage of both the property owner and the government. See *Laurenti*, 581 F.2d at 43-44; *United States* v. *Lovasco*, 431 U.S. at 793. That result would be especially unjustified where, as here, the property in question was not seized prior to commencement of the forfeiture proceedings, and the owner therefore suffered no prejudice and had no substantial countervailing equities during any period of pre-filing delay.

2. The court of appeals' invocation of Sections 1602 through 1604 also cannot be reconciled with the disposition of the statutory timeliness issue by this Court in *United States* v. *$8850*, *supra*. In *$8850*, the Court announced a flexible four-part test (drawn by analogy from the speedy trial test under *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972)) for assessing the

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[28] Significantly, the language in 19 U.S.C. 1604 directing the Attorney General to cause proceedings to be instituted "forthwith" and "without delay" is followed by language stating that he need not do so if he "decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises." Because this language assumes the continued existence of the Attorney General's discretion in enforcing the laws, it undercuts the notion that Sections 1602 through 1604 circumscribe that discretion to the extent of imposing the severe sanction of dismissal. *Laurenti*, 581 F.2d at 43.

lawfulness under the Due Process Clause of delay between seizure of property and institution of judicial forfeiture proceedings. 461 U.S. at 564. In doing so, however, the Court rejected the approach of *United States* v. *Thirty-seven Photographs*, 402 U.S. 363 (1971). In that case, the Court read time limits into a different statutory provision to ensure a prompt disposition of objections to the seizure of allegedly obscene materials, and thereby to avoid a substantial question concerning the constitutionality of the statutory scheme under the First Amendment. The Court reasoned in *$8850* that even if it "were inclined to interpret the statutes here in such a way as to avoid any due process question, it would be impossible to read into the statutory scheme, as we did in *Thirty-seven Photographs*, a short statute of limitations, since 19 U.S.C. § 1621 (1976 ed., Supp. V) expressly allows the Government to bring a civil forfeiture proceeding within five years." 461 U.S. at 563 n.13. The court of appeals' reading of a shorter (and vaguer) limitations period into 19 U.S.C. 1602-1604 cannot be reconciled with this holding in *$8850*.[29]

[29] Prior to *$8850*, some courts of appeals had followed the approach of *Thirty-seven Photographs* in cases governed by 19 U.S.C. 1602-1604 and dismissed forfeiture actions for failure to satisfy the promptness standards the courts found in those provisions, thereby avoiding the question of what limits the Due Process Clause imposes. See, *e.g.*, *Sarkisian* v. *United States*, 472 F.2d 468, 471 (10th Cir.), cert. denied, 414 U.S. 976 (1973); *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146, 1151-1156 (4th Cir. 1974); *United States* v. *One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977); see also *United States* v. *One 1971 BMW 4-Door Sedan*, 652 F.2d 817, 818 n.1 (9th Cir. 1981). Those decisions do not survive *$8850*, which makes clear that the Due Process Clause is the sole source of protection (aside from the five-year statute of limitations in 19 U.S.C. 1621) from delay prior to institution of forfeiture proceedings. The Ninth Circuit itself previously had recognized, after *$8850*, that those statutory provisions impose no enforceable standards independent of the Due Process Clause. See *United States* v. *Two Hundred Ninety-Five Ivory Carvings*, 726 F.2d 529, 531 (9th Cir. 1984) ("the prompt referral implicitly required by § 1603 is a referral no later than the time judicial proceedings must be instituted to comply with constitutional due process").

The court of appeals sought to avoid the import of the quoted passage from *$8850* by labeling it mere "dicta" and by expressing the view that this Court "did not examine the effects of competing obligations under sections 1602-04." Pet. App. 7a. The court of appeals was wrong on both counts. This Court elsewhere discussed the statutory framework created by 19 U.S.C. 1602-1604 (see 461 U.S. at 557-558 & n.3), and specifically considered whether the statutes involved in the case, which included 19 U.S.C. 1602-1604, could be construed to avoid a due process problem by imposing a filing deadline shorter than the five years allowed by 19 U.S.C. 1621. The Court held that they could not. If the Court had concluded otherwise, it could have avoided the constitutional issue, just as it had in *Thirty-seven Photographs*. The quoted passage in *$8850* therefore cannot be dismissed either as mere dicta or as being unrelated to 19 U.S.C. 1602-1604.[30]

[30] Contrary to respondent's contention (Br. in Opp. 14-15), this holding in *$8850* is unaffected by the fact that Congress amended 19 U.S.C. 1603 to insert the word "promptly" after the seizure and forfeiture at issue in that case. There already were similar time requirements in 19 U.S.C. 1602 and 1604, and the Court concluded that they did not operate as judicially enforceable limitations periods, because 19 U.S.C. 1621 furnishes an express statute of limitations. Congress's sub-

3. Even if dismissal might be proper in certain situations, this case presents an especially inappropriate occasion for that drastic sanction. Prior cases arising under 19 U.S.C. 1602-1604 have involved forfeiture proceedings instituted after the property was seized. See, *e.g.*, cases cited at note 29, *supra*. In that situation, the owner is dispossessed of the property and may experience hardship or disadvantage as a result. It is a radical departure from prior understandings to construe 19 U.S.C. 1602-1604 to require (subject to the sanction of dismissal) "prompt" referral of possible violations to the Attorney General and institution of judicial proceedings "without delay" where there has been no such seizure. In that setting, 19 U.S.C. 1602-1604, as construed by the court below, would constitute a judicially enforceable directive to complete an investigation hastily, despite the absence of any prejudice to the owner. The Constitution imposes no such limitations,[31] and there is no reason to suppose that Congress intended to do so. In this case, then, a dismissal under 19 U.S.C. 1602-1604 would result in a

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sequent insertion of a parallel promptness requirement in 19 U.S.C. 1603 does not alter the Court's conclusion that 19 U.S.C. 1621 furnishes the only judicially enforceable limitations period under the forfeiture statutes—especially since the Court adverted to that amendment to 19 U.S.C. 1603 without intimating that it would have affected the outcome. See 461 U.S. at 558 n.3.

[31] See *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966) ("[l]aw enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause"); *Lovasco*, 431 U.S. at 792 (due process imposes limits only on oppressive pre-indictment delay).

wholly unjustified windfall for a claimant who concededly used his property to facilitate a violation of the federal drug laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the
Supreme Court of the United States
October Term, 1992

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT

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No. 92-1180

In the

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

1. The government is attempting to forfeit a four-acre parcel of land owned by James Good, including his home, four and a half years after the discovery of marijuana on the property by local police and four years after Good's criminal conviction in state court.

Good purchased the property on December 12, 1978, and October 4, 1982. (R. 29, Ex. "A"-"B".) (The land originally consisted of two parcels which were consolidated into one. R. 33, Ex. "C".)

On January 31, 1985, local police, accompanied by an IRS agent, executed a search warrant on Good's property and found eighty-nine pounds of marijuana, mostly in a workshop separate from the house, vials containing thirty-three grams of hashish oil, marijuana seeds, and currency. (R. 1; R. 29, Ex. "I"; Pet. App. 3a.)

Good was charged with promoting a harmful drug in the second degree in a criminal complaint issued in the Third Circuit Court, State of Hawaii, on June 4, 1985. (R. 29, Ex. "D"; Pet. App. 3a.)

Good pleaded guilty to the charge on July 3, 1985. (R. 29, Ex. "E"; Pet. App. 3a.) He was pronounced guilty and sentenced on August 7, 1985. (*Id.*) Good was placed on five years' probation, fined $1,000, and ordered to serve one year in jail. (*Id.*) Good also forfeited $3,187.00 in cash found on the premises in a state court forfeiture action. (*Id.*; R. 45, Ex. "B".)

2. By August, 1989, Good was performing satisfactorily in his probation, and had completed all of the special terms of his probation. (R. 29, Aff. of Eva Metz.) But on August 8, 1989, four years, six months and eight days after the original search, the United States filed a complaint for forfeiture against Good's property in the district court. (J.A. at 11-13.) A "Notice of Pending Action" was also filed. (R. 3.) On August 8, 1989, a court clerk issued a "Warrant of Arrest" which directed the United States Marshal to seize the property and detain it until further order of the court. (J.A. at 15-16.)

On August 18, 1989, a magistrate signed a warrant authorizing the seizure of the property, which commanded the marshal to:

> seize the property... and make the seizure and leave a copy of this warrant. You are also commanded to enter into upon the defendant property... for the purpose of

> appraising the value of the property, photographing and inspecting the interior of any appurtenances and improvements, including any dwelling, and to ensure the condition of the premises and to ensure the absence of any safety hazards, and to prepare a written inventory of the property seized. (J.A. at 28.)

The warrant was issued *ex parte* on the strength of an affidavit filed by DEA agent Robert Aiu, which described the items seized by the police in January, 1985, and which recounted events leading up to the 1985 search. (R. 29, Ex. "F".) On August 21, 1989, U.S. Marshals posted the property, and entered and searched the home. (*Id.*, Ex. "G"; Pet. App. 3a.)

Although the dwelling on the property was Good's normal residence, it was temporarily being rented to tenants for $900.00 per month while Good worked in Central America for a charitable organization, Project Christ the King. (R. 29, Ex. "G"; R. 37, Ex. "A"; R. 33, Ex. "B" at 12.) Good had lived in the home from 1980 until April, 1987, and Good had stayed in the home during his return visits to Hawaii (most recently in September - October, 1988). (R. 33, Ex. "A" at 3.)

Good had no prior notice of the seizure and no opportunity to be heard before the seizure. (R. 29; Pet. App. 12a.)

The government allowed Good's tenants to remain in possession under an occupancy agreement but ordered them to make their rental payments to the government. (R. 29, Ex. "G".) The government was willing to allow Good to resume occupancy under an occupancy agreement during the pendency of the forfeiture proceedings, but he could not because of his commitment to work abroad for the charitable organization. (R. 29, affidavit of Christopher J. Yuen.)

The forfeiture action was based entirely on 21 U.S.C. §881(a)(7), which allows the forfeiture of real property "used,

or intended to be used," to commit or to facilitate the commission of a violation of the Controlled Substances Act punishable by more than one year's imprisonment. The government has not alleged that the real property constituted proceeds of drug transactions. (J.A. at 11-13.) Good filed an answer and a verified claim on October 18, 1989, asserting that he was the rightful owner of the property, and stating a number of defenses, including claims that he had been deprived of his property without due process of law and that the forfeiture had not been timely commenced. (J.A. at 17-26.) Good filed a motion for summary judgment on July 13, 1990, arguing that the forfeiture was untimely, that his due process rights had been violated by the *ex parte* seizure, and that the forfeiture constituted a second punishment in violation of the Double Jeopardy Clause. (R. 29; Pet. App. 3a-4a.) Good also argued that 19 U.S.C. §1615, which requires the claimant to shoulder the burden of proof, and the fact that the government need not prove its case beyond a reasonable doubt, both violated due process. Good also filed a motion to exclude the evidence obtained during the January 1985 search on the basis that the affidavit in support of the 1985 warrant had not specified the time when the alleged illegal activities had been observed. (*Id.*, R. 30.)

The district court denied both motions. (R. 47; R. 52.) It granted the government's motion for summary judgment. An order declaring the property to be forfeited to the government was entered on October 3, 1990. (J.A. at 30.)

Good appealed the judgment. The court of appeals reaffirmed in part, reversed in part, and remanded for further proceedings.

3. The court of appeals first held that the forfeiture action was untimely and should be dismissed if, on remand, Good proved that the FBI or DEA had not acted promptly to commence forfeiture against the property after learning of

grounds for forfeiture. The court of appeals' holding was based upon customs laws made applicable to the forfeiture by 21 U.S.C. §881(d).

The court found that the plain language of 19 U.S.C. §1602-1604 commanded government agents to institute forfeitures promptly after discovering violations. The court of appeals rejected the government's argument that these provisions only applied when property had already been seized. It held that these provisions bound DEA and FBI agents —those authorized to make seizures under the Controlled Substances Act — to promptly report violations of the law implicating potential forfeitures to the United States attorney, and for the United States attorney to promptly institute forfeiture if the circumstances so warranted.

Although an IRS agent had been present during the search of Good's home, the court of appeals decided that his knowledge did not trigger the prompt action requirement because IRS agents are not authorized to seize property or report drug offenses. Because the government had refused to answer interrogatories on the issue, the record did not demonstrate when DEA or FBI personnel learned of the grounds for forfeiture. The court of appeals remanded the case to the district court for this determination.

The court of appeals held that the five-year statute of limitations in 19 U.S.C. §1621 was an outer time limit and did not authorize the government to seek forfeiture at any time during the five-year period. Rather, 19 U.S.C. §1602-1604 imposed a separate timeliness obligation.

The court of appeals, without analysis, rejected Good's other timeliness argument, which followed the concurring opinion in *United States v. Tax Lot 1500*, 861 F.2d 232, 236 (9th Cir. 1988) (Ferguson, J., concurring), *cert. denied*, 493 U.S. 954 (1989).

The court of appeals also held that the seizure of Good's home under 21 U.S.C. §881 violated the Due Process Clause because the statute did not provide for notice and an opportunity for a hearing before the seizure. The court distinguished cases which upheld the seizure of personal property for forfeiture without prior notice and hearing because these all involved property that was easily moved. Applying the balancing text of *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court held that the importance of the home, and the fact that the property would still be available for forfeiture after a hearing, tipped the balance in favor of providing notice and a hearing. It further noted that government's interest in preventing transfer of the property could be achieved by a *lis pendens* and other means less restrictive of Good's rights than outright seizure.

The court declined to consider Good's facial challenge to 21 U.S.C. §881 because it found the seizure unconstitutional as applied. It also held that the property could still be forfeited despite the illegal seizure, but that Good was entitled to the rents that accrued during the illegal seizure.

The court rejected Good's Double Jeopardy and Fourth Amendment claims without discussion.

SUMMARY OF ARGUMENT

I. The seizure of Good's home four and a half years after marijuana was found during a police search, without prior notice or an opportunity for hearing, violated Good's rights under the Due Process Clause, because this court has consistently held that a property owner must be given prior notice and an opportunity to be heard before the government takes away significant property rights, unless "extraordinary circumstances" exist which justify postponing the hearing. *Fuentes v. Shevin*, 407 U.S. 67, 90-91 (1972); *United States v. $8850*, 461 U.S. 555, 562 n. 12 (1983).

This court applies the three part balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) when a property owner claims a right to an adversarial hearing before the government takes the owner's property, even temporarily. The *Mathews v. Eldridge* test balances: (1) the significance of the owner's interest; (2) the risk that there will be an erroneous taking of property under the procedures used; and (3) the government's interest in avoiding a hearing. All three factors demonstrate the need for an adversarial hearing in this case.

First, Good suffered a grievous loss — the government seized his home and four acres of land.

Second, erroneous deprivations are likely under the *ex parte* procedure. The court hears only the government's evidence of illegal use; claimants cannot present evidence of innocent ownership or other valid defenses to forestall seizure. It is especially important to allow owners a chance to contest the seizure because the real property forfeiture statute is so vague and sweeping, and is enforced by officials who may have selfish interests in seizing properties.

Third, the government has demonstrated no need to seize without a hearing. It was not in a rush to seize the property: it waited for fifty-four months to file the action. The government's *post hoc* excuses for not providing a hearing — that the owner might destroy the property, that seizing agents might be at risk if the owner knew they were coming, and that a claimant might exploit a hearing to obtain discovery — cannot survive scrutiny. The government typically allows occupants to remain after seizure, so they could still destroy the property. Seizing agents were in no danger from Good or his tenants, and there is no proof that an owner is more likely to violently oppose a seizure after being given a judicial hearing than if seizing agents storm the property without warning. A pre-seizure hearing adds nothing to the ability of claimants to obtain dis-

covery — they already have that right in a forfeiture case, and the court can control the extent of a pre-seizure hearing.

Although this court has held that no prior notice or hearing were required when a yacht was seized for forfeiture in *Calero-Toledo v. Pearson Yacht Co.*, 416 U.S. 663, 678-80 (1974), that case presented entirely different issues than a real property forfeiture. The *Calero-Toledo* court held that the government had an overriding interest to seize without prior notice because *in rem* jurisdiction could not attach if the owner took the opportunity presented by prior notice to sail away with the *res*. Obtaining *in rem* jurisdiction is never a problem in a real property case. Even after a hearing, the property will be there to be seized, and "seizure" can be accomplished simply by posting the property and leaving the process with the occupant, without other interference with the owner's rights. 21 U.S.C. §881(b); Rule E(4)(b), Supplemental Rules for Certain Admiralty and Maritime Claims; *United States v. TWP 17 R 4, Certain Real Property In Maine*, 970 F.2d 984, 989 (1st Cir. 1992).

The government devotes most of its brief to the argument that the court should discard the *Mathews v. Eldridge* test entirely in this action and hold that the Fourth Amendment alone is the procedural guide for governmental takings of property "for law enforcement purposes" (which the government never defines.) The government wants to follow only the procedures used for a search warrant — an *ex parte* judicial determination of probable cause — whenever it seizes property "for law enforcement purposes." Notice and an opportunity for a hearing — the "core requirements" of the Due Process Clause — would never be needed, no matter how vital the owner's interests or how weak the government's need for urgent seizure.

The Fourth Amendment was primarily intended to protect privacy rights, not property. *Camara v. Municipal Court*, 387

U.S. 523, 528 (1967). The limited protections which the Fourth Amendment does give to property do not eliminate the more general protections independently provided by the Due Process Clause of the Fifth Amendment.

Search warrants authorize the seizure of evidence, contraband, weapons and the like under circumstances where a prior adversarial hearing might easily lead to their concealment. Procedures adequate for search warrants were never intended for seizure warrants covering homes and land.

II. 19 U.S.C. §1602-1604 command the government's agents, in the plainest possible language, to initiate judicial forfeitures "promptly," "forthwith," and "without delay" after learning of violations. Good's home and land were not subject to administrative forfeiture, so the statute required the prompt commencement of the forfeiture action.

Because forfeiture is a peculiarly harsh sanction, the government must follow the strict letter of the law in carrying out the forfeiture, or it should be dismissed.

Public policy also supports a requirement that forfeitures be promptly commenced. Otherwise, the government will continue to dredge up and prosecute stale cases like Good's. Because of the overwhelmingly punitive nature of 21 U.S.C. §881(a)(7), and its potential for abuse, the court should strictly enforce the limits in 19 U.S.C §1602-1604.

ARGUMENT

I. THE SEIZURE OF GOOD'S HOME VIOLATED THE DUE PROCESS CLAUSE BECAUSE "EXTRAORDINARY CIRCUMSTANCES" DID NOT EXIST TO PERMIT THE SEIZURE WITHOUT NOTICE AND HEARING.

A. Due Process Normally Requires Notice and an Opportunity To Be Heard Before a Significant Property Deprivation.

The Due Process Clause of the Fifth Amendment requires that a property owner be given notice and an opportunity to be heard before the government takes his or her property, unless extraordinary circumstances exist which allow the government to postpone notice and a hearing. *Fuentes v. Shevin*, 407 U.S. 67, 90-91 (1972); *United States v. $8850*, 461 U.S. 555, 562 n. 12 (1983). Because Good had no prior notice or opportunity to be heard, and no extraordinary circumstances existed, the seizure of his home violated the Due Process Clause.

Notice and an opportunity for hearing are the very core of due process. "[T]he 'root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a hearing *before* he is deprived of any significant interest.'" *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (emphasis in original) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Notice and an opportunity to be heard have long been recognized as the central elements of due process. In *Hovey v. Elliot*, 167 U.S. 409, 415-417 (1896), the court traced the prohibition against taking property without notice and an opportunity to be heard to the Magna Charta and the common law of England. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863). This court has insisted upon notice and an opportunity to be heard before the deprivation of significant property rights, absent extraordinary circumstances, in a long line of cases. *Baldwin v. Hale; Hovey v. Elliot; Grannis v. Ordean,*

234 U.S. 385, 394 (1914); *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Armstrong v. Marzo*, 380 U.S. 545, 552 (1965); *Boddie v. Connecticut*; *Fuentes v. Shevin*; *Zinermon v. Burch*, 494 U.S. 113, 127 (1990); *Connecticut v. Doehr*, 111 S.Ct. 2105, 2111 (1991).

The opportunity for a hearing "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Marzo*. This means a hearing before property is taken away — even temporarily. *Fuentes v. Shevin*; *Boddie v. Connecticut*.

B. No "Extraordinary Circumstances" Were Present to Allow the Government to Avoid a Hearing.

A narrow exception exists to the requirement for a pre-seizure hearing: the hearing may be postponed under "extraordinary circumstances," which are "truly unusual." *Fuentes v. Shevin*, 407 U.S. at 90.

This court has also utilized the three-part balancing test in *Mathews v. Eldridge*, 424 U.S. at 335, to determine whether a pre-deprivation hearing must be held. The application of the *Mathews v. Eldridge* test to the facts of this case is set forth in a separate section of this brief.

Fuentes held that three elements must exist for a seizure without prior hearing to be constitutionally permissible:

1. The seizure must be "directly necessary to secure an important governmental or general public interest."
2. There must be "a special need for very prompt action."
3. The person initiating the seizure must be "a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." 407 U.S. at 91.

All three elements must exist for a court to approve a seizure without prior notice and hearing. *Id.*

In *Calero-Toledo v. Pearson Yacht Co.*, 416 U.S. 663 (1974), the court held that a yacht could be seized in a drug forfeiture case by Puerto Rican authorities without a prior hearing because the seizure met the *Fuentes v. Shevin* criteria. 416 U.S. at 677-680.

The present case differs from *Calero-Toledo* on each of the criteria.

1. The "important governmental interest" found by the *Calero-Toledo* court was that seizure was necessary to enable the government to obtain *in rem* jurisdiction. A yacht owner could use the delay afforded by pre-seizure notice and hearing to abscond with the *res* and prevent *in rem* jurisdiction from ever attaching. With real property, in contrast, the owner cannot remove the *res*; it will continue to be available for seizure after a hearing.

The *Calero-Toledo* court explained that "seizure under the Puerto Rican statutes serves significant governmental interests: seizure permits Puerto Rico to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings." 416 U.S. at 679.[1] The footnote to the passage just quoted also demonstrates that asserting jurisdiction was the important interest: "*Cf. Ownbey v. Morgan*, 256 U.S. 94 (1921), cited with approval in *Fuentes v. Shevin, supra*, 407 U.S. at 91, n. 23, 92

[1] In the same passage, the *Calero-Toledo* court then stated that forfeiture will foster "the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions." The court could not have meant that these goals permitted the government to dispense with a hearing, because they could have been achieved as well after a hearing: rather the court meant that prehearing seizure was justified to establish jurisdiction over the property so that the ultimate goal of forfeiture could be achieved.

S.Ct. at 1999." *Fuentes* cited *Ownbey* as a case which "involved attachment necessary to secure jurisdiction in state court — clearly a most basic and important public interest." *Fuentes* at 92 n. 23.

In the case of real property, *in rem* jurisdiction over the property itself can always be obtained after giving the owner a hearing to contest the seizure.[2]

Even after a hearing, the government can eventually obtain *in rem* jurisdiction over a real property *res* for forfeiture under 21 U.S.C. §881(a)(7) simply by posting the property and leaving a copy of the process with the occupant. 21 U.S.C. §881(b); Rule E(4), Supplemental Rules for Certain Admiralty and Maritime Claims; *United States v. TWP 17 R 4, Certain Real Property In Maine,* 970 F.2d 984, 989 (1st Cir. 1992). Jurisdiction over the *res* can be established without search, entry into the home, or other interference with the owner's or occupant's rights. *Id.*

21 U.S.C. §881(b) provides: "[a]ny property subject to civil forfeiture under this subchapter may be seized by the Attorney General under process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property."

Rule E(4)(b) of the Supplemental Rules provides that in executing process:

[2] An executive branch seizure is not necessary before the filing of the complaint in a forfeiture case under 21 U.S.C. §881(a)(7). See 1 D. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶9.01[2] at p. 9-6 (1992). The government had an *ex parte* hearing before seizing Good's home; there is no jurisdictional reason it could not have a hearing with parties present.

> If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal or other person executing the process shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or the person's agent.

Surely, it is "impracticable" to take a dwelling and four acres of land into "actual possession." Except for fencing the property or hiring a guard — actions which the government would surely argue are unnecessary and impractical — the government could scarcely do more to "seize" unimproved real property than to post the process. If posting is sufficient to execute process and "seize" unimproved real property, it should also be sufficient to "seize" improved real property, such as Good's. The real property itself, of course, is always within the court's territorial jurisdiction, unlike a yacht or other moveable property.

In *United States v. TWP 17 R 4*, the court held that, at least for undeveloped real property, no more than posting is necessary for jurisdiction to attach. The government has agreed in Good's case that warrants of arrest *in rem*, which provide "the most minimally intrusive means by which forfeiture jurisdiction may be established over the real property," are "sufficient to establish the court's jurisdiction over the property." Petition for Rehearing with Suggestion for Rehearing *En Banc* at 15, n. 24. The government also agrees that a warrant of arrest may "in some circumstances be served simply by posting it on the premises without further seizure," Brief for the United States at 12, n. 5; and that "at least in some circumstances, a court may acquire bare jurisdiction over the defendant real property simply through issuance and service of an *in rem* warrant of arrest," Brief for the United States at 28, n. 18.[3] Thus, "seizure" of a real

[3] The government does argue, somewhat inconsistently, that "seizure ordinarily would be necessary for the court to acquire and exercise meaningful custody over the premises and to ensure against its continued use for illegal purposes." (Brief for United States at 28, n. 18.) However, once jurisdiction is established, it could not be defeated by removal or destruction of the *res*, *Republic National Bank of Miami v. United States*, 113 S.Ct. 554, 559 (1992), and *a fortiori*, could not be defeated by illegal use of the property by an occupant. *Republic National Bank* states that "a valid seizure of the *res* is a prerequisite to the *initiation* of an *in rem* civil forfeiture proceeding," 113 S.Ct. at 557, but does not discuss the extent of seizure necessary, or suggest any jurisdictional reason a hearing could not be held before seizure.

property *res* may be accomplished in a manner far less intrusive than that employed in this case, and there is no need for concern that delaying the seizure until after a hearing will lead to the disappearance of the *res*. The significant governmental interest in establishing jurisdiction can be achieved without violating due process rights.

2. The next point made by the *Calero-Toledo* court was that "preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized — as here, a yacht — will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." 416 U.S. at 679.

This corresponds to the second *Fuentes* element, "a special need for very prompt action." 407 U.S. at 91.

The government argues that if a hearing is held before seizure:

1. The property might be destroyed;
2. Its contents might be concealed, and they might be forfeitable "if used in, or the proceeds of, a drug transaction;"
3. Seizing agents might be endangered if the owner or occupants are tipped off in advance; and

4. The owner might use a hearing to obtain civil discovery. Brief for the United States at 29-30.[4]

These assertions are really the nub of this case. If they are illusory or insubstantial they cannot outweigh the other factors under the *Mathews v. Eldridge* balancing test discussed below, and cannot establish the "prompt action" element of *Fuentes*.

The government's own practices demonstrate it has no real concern that an owner will destroy the property rather than have it fall into the government's hands: as a matter of course, the occupant is allowed to remain in possession pending final action. See Brief for the United States at 13, fn. 6.[5] In the present action, Good's tenants were allowed to remain, and Good would have been allowed back. A disgruntled owner would have as much opportunity to destroy the property after an *ex parte* seizure as the owner would before a pre-seizure hearing. To be sure, the United States requires the occupant to promise that the property will be kept in good condition, but whatever prophylactic effect such an admonition alone might have could easily be duplicated by including an order to that effect in the warrant of arrest. (An *ex parte* temporary restraining order forbidding the owner to destroy the property would not be objectionable on due process grounds.) Even dispossession of the owner does not guarantee the property would not be destroyed — a determined owner could sneak back and destroy the building unless it were kept under guard, which is not the government's practice.

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[4] None of these concerns were presented in the government's briefs to the Ninth Circuit or to the district court. They are raised here for the first time and the court should not consider these *post hoc* excuses now.

[5] The government's policy has apparently not always been so benign. See *United States v. Property at 850 S. Maple*, 743 F.Supp. 505 (E.D. Mich. 1990) (mother and two children evicted from apartment, allegedly at gunpoint, during marshal's seizure after others had allegedly sold cocaine from the apartment.)

In this case, of course, Good has shown no desire to destroy his property: he has struggled in the judicial system for more than three years to get it back.

Finally, if the owner does destroy his or her own property, one purpose of forfeiture urged by the *amici curiae* attorneys general is still intact: the continued use and enjoyment of the property by the supposed malefactor is at an end. Indeed, self-destruction will strip the offender of his or her assets more swiftly than judicial proceedings.

The government claims that the *Calero-Toledo* court, by saying that property subject to forfeiture "will often be of a sort" that can be removed, concealed, or destroyed, created a generic forfeiture exception to the normal requirement of a pre-seizure hearing that applies even if the property cannot be removed, concealed, or destroyed. There is no reason that this court should create a legal rule severed from its underlying rationale and "override common sense." *Republic National Bank of Miami v. United States*, 113 S.Ct. at 559.

The government's next argument is that the contents may be forfeitable "if used in, or the proceeds of, a drug transaction." This fails because the government never alleged that the contents of Good's home constituted drug proceeds[6] and never sought forfeiture of the personal property contents. The government did not bring this action under any of the subsections of 21 U.S.C. §881(a) authorizing forfeiture of personal property.

Again, the government's willingness to allow occupants to remain belies any concern over the fate of the contents. The occupant can easily conceal contents after seizure if he or she is allowed to remain.

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[6] State authorities did forfeit a portion of the cash found in the home as drug proceeds.

The government next argues that seizing agents may be endangered if the owner has advance notice. The government offers no empirical evidence for the general proposition that it is more dangerous for agents to seize a home after the owner has been given an opportunity to oppose the seizure in court than it is to suddenly appear without warning. It is at least as likely that the owner will make the rational decision — to submit to lawful authority — if the owner has had time to reflect upon the likely consequences of armed resistance. Certainly agents are in some danger when they attempt to seize property *without* warning: guns are everywhere and it is possible that an occupant may react violently to an intrusion, perhaps mistaking it for criminal action. For this reason, seizure without warning creates a serious hazard for the occupant. In the absence of any empirical evidence that seizure without warning is safer than seizure after a hearing, the court should not base a constitutional decision upon this argument.

Under the circumstances of the case at bar, the government cannot argue that a violent reaction from Good was a real likelihood. He had served his probation without criminal incident for four years after the 1985 offense, he had surrendered peaceably when he was originally arrested in 1985 (R. 29, Ex. "I"), and he had no history of violence (R. 33, Ex. "A"-"B").

If the government had specific evidence that a pre-seizure hearing would place agents in danger, these facts, if properly presented to a magistrate, might constitute exigent circumstances allowing the magistrate to issue an *ex parte* warrant. No such facts were presented in this case, nor do they appear anywhere on the record.

The government finally argues that a claimant might use the pre-seizure hearing to obtain discovery, including the names of informants. Any hearing would be under the control of the court, and the court could recognize applicable privileges, such as the governmental informant privilege. At any rate, the

claimant is entitled to discovery after appearing and filing a notice of claim under the Federal Rules of Civil Procedure, which apply to forfeiture actions. The pre-seizure hearing does not create a potential for discovery; that potential already exists. If the government is concerned that civil discovery may prejudice a pending criminal case, it may file, and stay, the civil forfeiture. 21 U.S.C. §881(i); *United States v. James Daniel Good Real Property*, 971 F.2d 1376, 1382 (1992). There is no indication in the Ninth Circuit's opinion that the scope of what may ultimately be discovered is expanded by allowing a pre-seizure hearing.

3. The third *Fuentes* factor considered by the *Calero-Toledo* court was whether the search was initiated by a "government official responsible for determining, *under the standards of a narrowly drawn statute*, that it was necessary and justified in the particular instance." 416 U.S. at 678, citing *Fuentes*, 407 U.S. at 91 (emphasis added).

Whatever might be said about the statute involved here, 21 U.S.C. §881(a)(7), it cannot be claimed that it is "narrowly drawn." The language that any real property may be forfeited "which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of," a felony drug crime, is extremely broad and vague, and easily lends itself to abuse. See *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992) ("[w]e continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes);" *United States v. Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1265, 1270 (2d Cir. 1989) (suggesting that 21 U.S.C. §881(a)(7) would appear to allow the forfeiture of the 800,000 acre King Ranch if drugs were sold in a shed on the ranch); *United States v. One Parcel of Real Property Located at 508 Depot Street*, 964 F.2d 814, 818 (8th Cir. 1992) ("we are troubled by the government's view that any property, whether

it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in single drug transaction"), *cert. granted sub. nom. Austin v. United States*, 113 S.Ct. 1036 (1993) (No. 92-6073).

As it has been applied, 21 U.S.C. §881(a)(7) is an extraordinary extension of the reach of *in rem* civil forfeiture. Originally, *in rem* forfeiture rested upon the "personification" fiction. *J. W. Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 510-511 (1921). The fiction was typically applied to objects which could reasonably be considered the instrumentalities of crime, or the means by which crimes were committed, or which were contraband in themselves:

> "The thing is the instrument of wrong, and is forfeited by reason of the unlawful use made of it, or the unlawful condition in which it is placed. And generally the thing, thus subject to seizure, itself furnishes the evidence for its own condemnation. Thus, goods found smuggled... prove of themselves nearly all that is desired to establish the right of the government to demand their confiscation. A ship entering the mouth of a blockaded port furnishes by its position evidence of its intention to break the blockade, and the decree of condemnation follows." *Miller v. United States*, 78 U.S. (11 Wall.) 268, 321-322 (1871) (Field, J. dissenting)

Any logical force this doctrine might have had when applied to contraband, ships caught running a blockade, or to the common-law deodand (the actual instrument causing death) is at best severely attenuated when the doctrine is extended — as it has been under 21 U.S.C. §881(a)(7) — to forfeit large tracts of land which have no connection with crime other than being the location where a drug transaction occurred. *See, e.g., United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989) (four sales of cocaine totalling 12.8 grams sufficient for forfeiture of

acres of property, including a home); *4492 South Livonia Road* (forfeiture of 120 acre farm with house and two barns upon proof of two cocaine sales, plus drug paraphernalia, and small amounts of cocaine and marijuana on the premises.) Even the laws allowing forfeiture of real property associated with distilleries, which appear to include all of the earlier cases involving real property forfeitures, limited the forfeiture to the property connected with the distillery itself. *United States v. Reynolds*, 856 F.2d 675, 677 (4th Cir. 1988). 21 U.S.C. §881(a)(7) is so broad that courts have required a "substantial connection" between the illegal activity and the real property. *United States v. Parcel of Land & Residence at 28 Emery Street*, 914 F.2d 1 (1st Cir. 1990). Questions also arise concerning the extent of a tract that is subject to forfeiture, *United States v. Tax Lot 1500*, 861 F.2d 232 (9th Cir. 1988), *cert. denied* 493 U.S. 954 (1989), or whether more than one tract is involved. The factual circumstances under which a parcel of real property may be considered to have been used to facilitate the commission of a crime are far broader than the statutory grounds in *Calero-Toledo*, which limited forfeiture to vessels used to transport controlled substances.

This court should also reconsider the statement in *Calero-Toledo* that governmental forfeitures are less suspect because they are "not initiated by self-interested private parties." 416 U.S. at 679. This forfeiture, like many others today, was initiated by a self-interested *public* party. The DEA may share in the proceeds of forfeiture, and proceeds may be rebated to local authorities. 21 U.S.C. §881(e). This governmental incentive provides a special temptation for abuse. *Harmelin v. Michigan*, 111 S.Ct. 2680, 2693 n. 9 (1991) (Scalia, J.) ("it makes sense to scrutinize governmental action more closely when the State stands to benefit").

None of the three elements found essential by the *Fuentes* and *Calero-Toledo* courts exist in Good's case. *Calero-Toledo* was a very different case, and the results should differ as well.

Stare decisis does not require this court to hold that seizure of a home is the same as the seizure of a yacht. *Calero-Toledo* itself made no claim to a holding beyond its own facts: "In these circumstances, we hold that this case presents an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process." 416 U.S. at 679-680.

When *Calero-Toledo* was decided, real property forfeitures had been rare, arising generally in distillery cases dating from the 1930's and earlier. The *Calero-Toledo* court could not be charged with anticipating the vast expansion of real property forfeitures that occurred after the enactment of 21 U.S.C. §881(a)(7) ten years later in 1984, and the decision does not control a case with fundamentally different facts. *Accord*, *4492 South Livonia Road* (hearing required before seizure of a home, distinguishing *Calero-Toledo* on the grounds that it involved moveable property); *Richmond Tenants Organization v. Kemp*, 956 F.2d 1300, 1307-1308 (4th Cir. 1992) (same); *United States v. A Parcel of Land, Appurtenances, and Improvements, Known as 92 Buena Vista Ave.*, 937 F.2d 98, 101 (3rd Cir. 1991) (same), *aff'd on other grounds*, 113 S.Ct. 1126 (1993); *Department of Law Enforcement v. Real Property*, 588 So.2d 957, 965 (Fla. 1991) (due process guarantees in Florida State Constitution require adversarial hearing before any restraint on real property in forfeiture cases other than a *lis pendens*.)

The other forfeiture case primarily relied upon by the government — *United States v. $8850* — is also easily distinguishable from the case at bar. In *$8850*, a customs inspector seized cash at a border search. The claimant did not argue that a hearing was necessary before seizing the cash, but the court, in *dicta*, went on to discuss why it was not. Citing *Calero-Toledo*, the court stated that a requirement to conduct a hearing before seizing items subject to forfeiture "would make customs processing entirely unworkable." 461 U.S. at 562 n. 12.

The decision in *$8850* is easy to understand. Customs agents cannot be expected to summon a magistrate to conduct a hearing every time they find contraband. The *res* was easily moved or hidden; if it were not seized, forfeiture could not even have been instituted without the owner's cooperation. The concern that removal of the *res* might prevent a forfeiture action from being initiated *never* applies in a real property forfeiture.

C. Under the *Mathews v. Eldridge* Test, An Adversarial Hearing Was Required Before Seizure.

In *Mathews v. Eldridge*, the court set out a general three-part balancing test for cases in which an individual claims that the government's failure to provide a pre-deprivation hearing violates due process.

The court must consider:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 335.

Mathews v. Eldridge involved the termination of social security benefits. Prior to termination, the agency provided "elaborate" procedures, 424 U.S. at 339, and the claimant actually had both notice and the opportunity to provide evidence to the decisionmaker prior to the initial denial of benefits. Under those circumstances, a full evidentiary hearing was not needed before termination. 424 U.S. at 349.

1. On the first *Mathews* factor, Good unquestionably suffered a significant property deprivation by the seizure of his home. He lost his right to receive rents, his right to enforce the tenant's obligations to maintain the dwelling, (see Hawaii Rev. Stat. §521-51), and his right of reasonable access to the premises to inspect and ensure proper use (see Hawaii Rev. Stat. §521-53). Good lost his right to re-enter at the end of the lease term. The fact that the government allowed Good's tenants to remain, at its sufferance, does not eliminate the fact that the seizure was a significant infringement. *See 4492 South Livonia Road* at 1265. Good was restrained from transferring the property. Finally, although Good was not living on the property at the time of the seizure, it was still his home, not a commercial rental, and entitled to at least a measure of the heightened respect — even "sanctity," *Payton v. New York*, 445 U.S. 573, 601 (1980) — that the home traditionally enjoys in the law. Although he was temporarily abroad, he stayed at his home on return visits to Hawaii.

In short, the seizure took away every property right Good enjoyed in four acres of land and his home, except the right to make a claim for their return.

At the time of the seizure, Good's salary as a charity worker was $100.00 per month, as well as room and board (R. 33, Ex. "C", p. 33); the rental payments were a significant source of income to him, a factor which must be considered in the balancing test. *Mathews v. Eldridge*, 424 U.S. at 342-343.

The deprivation suffered by Good was considerably more severe than those recognized as significant by this court in other cases where it has held that due process required prior notice and hearing. In *Connecticut v. Doehr*, 111 S.Ct. at 2113, the court held that a simple attachment of real property is a significant deprivation, and held that the failure to provide for an adversarial hearing before the attachment violated the Due Process Clause. In *Fuentes*, the private owners' loss of a stove,

a stereo, a bed, a table, and other household items, 407 U.S. at 70-71, was deemed significant enough to require a preseizure hearing. *Cf. Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring) (some form of notice and hearing is required before a deprivation of a property interest that "cannot be characterized as *de minimis*.") Good lost his home and four acres of land.

2. The second *Mathews* factor focuses on the risk of an erroneous deprivation given the procedures actually used, as well as the value of additional safeguards. The analysis in *Mathews* looked at social security disability cases generally, not just the case involving the particular claimant. In exercising the *Mathews* balancing test, the court must consider the risk of erroneous deprivations generally, not just the strength or weakness of the government's claim in this particular case. The fact that the government might ultimately prevail after a hearing does not excuse a due process violation. As the court said in *Fuentes*, "[i]t is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing." 407 U.S. at 87. "[T]he right to a hearing does not depend upon a demonstration of certain success." *Cleveland Board of Education v. Loudermill*, 470 U.S. at 544.

A hearing is an important safeguard: "fairness can rarely be obtained by secret, one-sided determination of facts and rights ... [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-172 (1951) (Frankfurter, J., concurring); *cited in Connecticut v. Doehr* at 2114.

In *Mathews*, the court's ultimate decision that no adversarial hearing need be held prior to termination of benefits relied largely on the pre-deprivation procedures available to the claim-

ant: he received advance notice, he could review all information relied upon by the agency, he could offer written submissions of evidence, and he could review and challenge the preliminary decision, before the actual termination of benefits. 424 U.S. at 344-346. None of these safeguards exist in a forfeiture case.

The *ex parte* hearing by the magistrate, who reviews only hearsay materials submitted by the government, is no substitute for an adversarial hearing. In *Connecticut v. Doehr*, the court held that the fact that the challenged procedure had an *ex parte* judicial determination of probable cause prior to attachment did not give sufficient protection against an erroneous deprivation. 111 S.Ct. at 2114.

The government argues that an adversarial hearing would add nothing because the government must only demonstrate probable cause to forfeit the property, which can be determined in an *ex parte* proceeding. Brief for the United States at 32-33. This argument actually shows why it is important that an owner be afforded a pre-seizure adversarial hearing, because it ignores the possibility of "innocent owners." In many real property cases, there will be owners who had no knowledge of the illegal activities. For example, the property may have been rented to a person using it for criminal activities, without the owner's knowledge, or there may be a lienholder with no knowledge of the illegal use. Probable cause may exist to forfeit the property, but an innocent owner who cannot contest the seizure certainly suffers an "erroneous deprivation." *United States v. Leasehold Interest at 121 Van Nostrand Ave.*, 760 F.Supp. 1015, 1029 (E.D.N.Y. 1991) (Weinstein, J.) (occupant should be given opportunity at hearing before eviction to prove innocent ownership.)

Under the present procedure of seizure without a hearing, an innocent owner has no way to protect his or her rights before the seizure.

There is also no adequate remedy following seizure. Under the federal rules of civil procedure, there seems to be no provision for a claimant to challenge the seizure before a trial on the merits, except for a motion for summary judgment or a motion to dismiss. 1 D. Smith at ¶10.05[10], p. 10-72.17. Fed.R.Crim.P. 41(e), which allows a claimant to have an evidentiary hearing when property is seized in a criminal case, does not apply in a civil forfeiture case. Fed.R.Crim.P. 54(b)(5); *United States v. Price*, 914 F.2d 1507, 1510 (D.C. Cir. 1990). Under Rule E(4)(f) of the Supplemental Rules for Certain Admiralty and Maritime Claims, a prompt post-seizure hearing must be provided, *except* for forfeiture actions brought by the United States.

The government could remain in control of the property, dispossessing the claimant, until the end of trial, as long as it had a case strong enough to survive summary judgment or a motion to dismiss, even if the claimant had a strong enough case on the merits to ultimately prevail at trial.

Even if it were available, the post-seizure hearing would not eliminate the due process concerns. *Fuentes* at 84-85; *Connecticut v. Doehr; United States v. Leasehold Interest at 121 Van Nostrand Ave.*

Turning to the case at hand, Good certainly had arguable claims — his timeliness argument convinced a Ninth Circuit panel; his Double Jeopardy argument was at least troubling to the district court judge who ordered forfeiture (Transcript of Proceedings, December 4, 1990), and it still cannot be said that the government will finally prevail.

There is ample evidence that the safeguard provided by an adversarial hearing may prevent unjustified deprivations in real property forfeiture cases. *See, e.g., United States v. Leasehold Interest at 121 Van Nostrand Ave.* (lessee whose eviction had been sought by government found to be innocent owner after

adversarial hearing); *United States v. Real Property Located at 110 Collier Drive*, 793 F.Supp. 1048, 1051 (N.D. Ala. 1992) (government persuaded court to order forfeiture of home by not disclosing that the quantity of marijuana involved would not establish a felony violation; court reversed its order, calling proceedings a "travesty of justice"); *United States v. Real Property Located at 623-636 Ninth Ave.*, 798 F.Supp. 1540, 1546 (N.D. Ala. 1992) (court criticized government for seizing rental home without investigating guilt of owner who proved to be an "innocent owner" ten months after seizure).

A real property forfeiture case requires the application of a vague and sweeping statute. It can scarcely inspire confidence that probable cause in a forfeiture proceeding may be proven by hearsay, *United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1287 (9th Cir. 1983), inadmissible in virtually any other kind of civil or criminal case.

The forfeitability of a parcel is not always the open-and-shut case that the government seems to think. Sometimes the government errs in its interpretation of the law. Earlier this term, the court rejected the government's views on the scope of the "relation back" doctrine and the "innocent owner" defense in forfeiture cases. *United States v. A Parcel of Land, Appurtenances, and Improvements Known As 92 Buena Vista Ave.*, 113 S.Ct. 1126 (1993). Providing an adversarial hearing reduces the possibility that the government will seize the property of innocent owners, *United States v. Leasehold Interest at 121 Van Nostrand Ave.*, that it will seize property when the necessary criminal activity has never occurred, *United States v. Real Property at 110 Collier Drive*; that it will seize property without sufficient nexus to criminal activity, *United States v. Parcel of Land & Residence at 28 Emery Street*; or that it will seize a tract of land beyond that involved in the criminal activity. The Due Process Clause's guarantee that the individual can argue his or her case to a judge serves as a small but significant check against governmental error.

3. The final *Mathews* factor to be considered is the government's interest in avoiding a hearing. 424 U.S. at 335. In *Mathews*, the inquiry focused on the cost and inconvenience to the government.

The disadvantages of affording a hearing argued by the government in this case — that the property might be concealed or destroyed; that seizing agents might be endangered; and that the owner might use the hearing to obtain discovery — were all analyzed earlier in this brief, during the discussion of *Calero-Toledo*, and demonstrated to be insubstantial.

In addition, *amici curiae* attorneys general argue that "the need to control the illicit drug industry stands on equal footing with the government's need to confiscate contaminated food or illicit drugs," (Brief for Amici at 6-7), citing *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (mislabeled drugs) and *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (contaminated food). The analogy to these older cases is inapt. If Good's home were in itself a threat to public safety, like contaminated food or mislabeled drugs, or if the government proved that exigent circumstances existed which required immediate seizure to prevent continued crime, *United States v. 141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990) *cert. denied* 111 S.Ct. 1017 (1991), the balance would tip against a pre-seizure hearing. A search warrant can always be obtained *ex parte* when there is probable cause that a felony drug crime is being committed in a dwelling, or that probable cause exists to find evidence of a crime. The government has never contended that Good's home was used, or intended to be used, for illegal purposes at the time of seizure some fifty-four months after the discovery of marijuana on the premises. The government's willingness to allow Good's tenants to remain also showed it had no real concern about the property being used for drug transactions. *United States v. Property at 850 South Maple* at 511.

Amici also argue that "the decision to seize an urban crack house or a rural drug lab without prior notice ... is best left to the discretion of law enforcement officers." (Brief for Amici at 9.) Again, if probable cause of ongoing drug activity exists, an *ex parte* search warrant can authorize seizure of contraband, instrumentalities of a crime, and evidence; and the *Good* decision can be affirmed on this point while leaving open the possibility that the government could obtain an *ex parte* warrant to seize premises where exigent circumstances truly exist — such as the dealer-infested apartment building in *United States v. 141st Street Corp.*

The administrative burdens of a rule requiring a pre-seizure hearing would be slight, especially when it is considered in relation to the value of the property, which is likely to be large when real property is involved. While real property forfeitures may now be fairly common, they are surely far less numerous than the social security determinations in *Mathews*. The government has not argued that a court hearing at the outset of a real property forfeiture involving a dwelling would be an intolerable burden on its attorneys or the courts.

In short, the *Mathews v. Eldridge* balancing test strongly supports honoring Good's right to a hearing before seizure.

As the government correctly notes, 21 U.S.C. §881(b) authorizes seizures of real property without prior notice, hearing, or judicial review. Under the Rule C(4) of the Supplemental Rules for Certain Admiralty and Maritime Claims, an *ex parte* judicial review must be held before seizures, *except* for forfeitures brought by the United States. While the government did have an *ex parte* hearing in Good's case, as discussed above, the *ex parte* hearing did not cure the constitutional defect because Good still had no notice or opportunity to be heard. This court should therefore hold that 21 U.S.C. §881(b) is unconstitutional as applied to the seizure of Good's home.

D. The Fourth Amendment Is Not the Source of the Minimum Requirements for Governmental Takings of Private Property.

The bulk of the government's brief is devoted to a novel proposition, never explicitly endorsed by any cited opinion: that when the government seizes property "for law enforcement purposes (including forfeiture)," Brief of United States at 25, the Fourth Amendment controls, and due process requires no procedures beyond those contained in the Fourth Amendment. Nothing more than an *ex parte* warrant approved by a magistrate based on probable cause, and stating with particularity the things to be seized, would ever be required to seize property "for law enforcement purposes."

The government's proposed rule would mean that the government could always dispense with prior notice and an opportunity for a hearing — the "root requirement" of the Due Process Clause, *Boddie v. Connecticut*; *Cleveland Board of Education v. Loudermill* — when it seized property "for law enforcement purposes," no matter how strong the owner's interests or how weak the government's need for prompt action.

The government's Fourth Amendment proposal contradicts the history and purposes of both the Fourth and Fifth Amendments, and the very language of the Fourth Amendment itself.

1. The Framers created the Fourth Amendment to protect privacy rights, not to set forth a procedural guide for the seizure of property. It was intended to safeguard against "invasions of home and privacy of the citizens and the seizure of their private papers in support of charges, real or imaginary, made against them." *Weeks v. United States*, 232 U.S. 383, 390 (1914). "The basic purpose of [the Fourth Amendment,] as recognized in countless decisions of this court, is to safeguard

the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

The language of the Fourth Amendment itself demonstrates that it was not intended to be the sole source of the limits on governmental seizures of real property for law enforcement or other purposes. By its terms, the Fourth Amendment does not even contemplate the seizure of real property: it authorizes warrants "particularly describing the *place* to be searched, and the *persons* or *things* to be seized." (emphasis added). It authorizes the search of a "place," but not its seizure; and the seizure of "persons" and "things," but not "places."

This language is not accidental. Governmental seizure of real property was not the evil which specifically inspired the enactment of the Fourth Amendment. The Fourth Amendment grew out of the abuses of warrants such as the English general warrant and the colonial writs of assistance, which authorized general searches by agents of the Crown enforcing British tax laws. *Stanford v. Texas*, 379 U.S. 476, 481-482 (1965). Such warrants "were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book'". *Id.* This denunciation "has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.'" *Id.*

Even the writs of assistance, despised as they were, did not permit the seizure of a colonist's home and land whenever contraband was found therein. Seizures under the early search warrants were limited in scope to stolen property, smuggled goods, and the like — "contraband, weapons, and plunder," *Zurcher v. Stanford Daily*, 436 U.S. 547, 578 (1978) (Stevens, J., dissenting): in other words, property in which the private

ownership interest was by definition insubstantial.[7] Had the colonists been subjected to a law which allowed the government to seize home and land because of the mere presence of contraband, the Framers might well have been inspired to enact some provision in the Bill of Rights specifically intended to curb the abuse.[8]

The Fourth Amendment was crafted against a known evil — arbitrary searches which interfered with privacy rights. Although it does protect property rights even when privacy concerns are absent, *Soldal v. Cook County*, 113 S.Ct. 538, 545 (1992), those protections are not its primary purpose. *Weeks v. United States; Camara v. Municipal Court.* It is a fundamental error to use the Fourth Amendment as a general guide to government takings of homes, land and other property, even in "law enforcement," when it was never intended for that purpose, and when the seizures contemplated under it were so restricted in scope.

The purpose of a Fourth Amendment search warrant is far different from that of the seizure warrant for Good's home. A search warrant's purpose is typically to "aid in the apprehension and conviction of criminals." *Fuentes* at 93 n. 30. The

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[7] The government cannot use the "relation back" doctrine to argue that Good's property interest in his home was similarly insubstantial: at most, "relation back" vests title in the government retroactively after the decree of forfeiture. *92 Buena Vista Ave.*, 113 S.Ct. at 1136. Good was the owner of his home when it was seized, and remained the owner during the forfeiture proceedings.

[8] A number of the more draconian elements of English forfeiture law were abolished by the Constitution or early statutes: bills of attainder (U.S. Const. Art. I, §9, cl. 3); corruption of the blood or forfeiture of estates for treason, except during the life of the traitor (U.S. Const. Art. III, §3, cl. 2); and forfeiture of estates or corruption of the blood for felonies (Act of April 30, 1790, 1st Cong., 1 Stat. 117, c. 9, §24, now 18 U.S.C. §3563).

Fuentes court explicitly discussed the differences between a search warrant and an attachment of property, explaining that the purpose of a search warrant — to acquire evidence of crime — could obviously be thwarted if prior notice were given. *Id.* To aid in solving crimes, a search warrant authorizes the seizure of "contraband, weapons, and plunder," *Zurcher v. Stanford Daily*, and evidence of crime. *Warden v. Hayden*, 387 U.S. 254 (1967). In contrast, the purpose of the seizure warrant here was to enable the government to take from Good all right, title, and interest to his home and four acres of land.

The Due Process Clause, on the other hand, is directly concerned with the property rights issues in this case. The "two central concerns of procedural due process" are "the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Due process rules are intended to minimize unfair or mistaken deprivations of life, liberty or property "by enabling persons to contest the bases upon which the State proposes to deprive them of protected interests." *Carey v. Piphus*, 435 U.S. 249, 259-260 (1978).

That the Fourth Amendment does apply to seizures of property, *Soldal v. Cook County*, does not eliminate the role of the Due Process Clause. "Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's dominant characteristic. Rather, we examine each constitutional provision in turn." *Soldal v. Cook County*, 113 S.Ct. at 548. In *Soldal*, the court refused to ignore the Fourth Amendment when the Due Process Clause could also have been applied. This court should not be persuaded to ignore its unwavering teaching that notice and an opportunity to be heard are the very core of the Due Process Clause by the government's argument that the Fourth Amendment, in other

contexts, provides lesser protection.

2. It is at best ironic that the government argues that the Fourth Amendment controls seizures for "law enforcement purposes" and cites *Gerstein v. Pugh*, 420 U.S. 103 (1975) to the effect that the Fourth Amendment controls searches and seizures in "criminal cases." (Brief for the United States at 25.) The government argued to the courts in the proceedings below that the seizure of Good's home was "civil" and "remedial," not "criminal" and "penal." (R. 37; Answering Brief in Ninth Circuit.) The government has consistently argued in other cases — with some success — that forfeiture actions denominated as "civil" by Congress, like 21 U.S.C. §881(a)(7), should not be treated as "criminal" by the courts. Thus, the government has successfully argued that forfeiture under 21 U.S.C. §881(a)(7) is "civil" and "remedial," not criminal, for the "dual punishment" aspect of the Double Jeopardy Clause, *United States v. Santoro*; and persuaded the court that a forfeiture action after a criminal acquittal was "civil," not a second criminal prosecution. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984). The government made a similar argument this term in *Austin v. United States*, No. 92-6073 (Eighth Amendment proportionality).

In *Gerstein v. Pugh*, one of the cases most cited by the government, the court held that the due process clause did not impose requirements beyond those contained in the Fourth Amendment when the government seized a criminal defendant before trial. But the *Gerstein* court — in language omitted by the government's brief — also stated that "the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." 420 U.S. at 125 n. 27.

A forfeiture proceeding is also "unique in jurisprudence," but in the opposite respect. As interpreted so far by the courts, it

seems designed to safeguard the government's desire to forfeit the property, not the "rights of those accused." The owner has the burden of proving the property's innocence, 19 U.S.C. §1615; with occasional statutory exceptions, the owner's innocence is no defense, *Calero-Toledo*; the government's ultimate burden of proof is only probable cause, 19 U.S.C. §1615; the "probable cause" burden is less even than a "preponderance of evidence" — the government must establish only "reasonable grounds, rising above mere suspicion," *4492 South Livonia Road*, 889 F.2d at 1267; the government can use rank hearsay, *United States v. One 56-Foot Motor Yacht Named Tahuna*; but the claimant cannot, *United States v. $2500 in United States Currency*, 689 F.2d 10, 16 (2d Cir. 1982), *cert. denied*, 465 U.S. 1099 (1984); *United States v. One 1968 Piper Navajo Twin Engine Aircraft*, 594 F.2d 1040, 1042 (5th Cir. 1979).[9]

The taking of Good's property had only a tangential relationship to law enforcement. It did not prevent the use of property for crime any more than taking anyone else's property. The only conceivable law enforcement objective served by the seizure was the punishment of Good. Applied to the facts of this case, the government's new rule is nothing more than a claim that the due process requirements of notice and a hearing never apply when the government wishes to take property to punish a wrongdoer.

Seizure of Good's real property is not even authorized under present criminal procedure. Fed.R.Crim.P. 41(b), which governs "all possible steps in the criminal case from its inception to judgment and sentence," *United States v. Choate*, 276 F.2d 724, 727 n. 27 (5th Cir. 1960), authorizes the search for

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[9] Not all of the procedures cited in the preceding paragraph have received this court's final blessing, and respondent does not concede that they should all pass constitutional scrutiny. Nonetheless, the paragraph accurately describes civil forfeiture law as practiced in the federal courts.

and seizure of:

> 1. property that constitutes evidence of the commission of a criminal offense; or
> 2. contraband, the fruits of a crime, or things otherwise criminally possessed; or
> 3. property designed or intended for use or which is or has been used as the means for committing a criminal offense. Fed.R.Crim.P. 41(b).

Under the facts of this case, Good's home and four acres of land could not be seized under Fed.R.Crim.P. 41(b): they are not "the means for committing a criminal offense," and they fit in no other category.

3. The government also relies heavily on *United States v. Monsanto*, 491 U.S. 600, 615 (1989), where the court stated that assets, including a home, could be "restrained" pending trial, based on probable cause, when the owner was allowed to remain in possession. *Monsanto* does not help the government: because there had been a full evidentiary hearing, the court expressly stated that it did not reach the question whether such a hearing was required before a seizure. 491 U.S. at 615 n. 10. The *Monsanto* court's analogy to the "restraint" of a person pending trial, "where there is a finding of probable cause to believe that the accused has committed a serious offense," citing *Salerno v. United States*, 481 U.S. 739 (1987), actually indicates that an adversarial hearing must be held to restrain property pending trial. *Salerno* involved the constitutionality of the Bail Reform Act, and the finding of "probable cause" in *Salerno* was made, as required by the Bail Reform Act, only after a full adversarial hearing. 481 U.S. at 742.

In addition, the restraint in *Monsanto* was only a restraint on the owner's ability to alienate the property, pending a criminal forfeiture trial. 491 U.S. at 615. The government had prevented Good from alienating his property by the filing of a

"Notice of Pendency of Action" on the day the complaint was filed. *See* Hawaii Rev. Stat. §501-151. Further seizure to prevent alienation was unnecessary.

4. In the two cases in the last quarter-century where this court considered due process issues in connection with forfeiture — *Calero-Toledo* and *$8850* — the court rejected, at least by implication, the government's Fourth Amendment argument. In *Calero-Toledo*, the court engaged in an explicit balancing analysis to justify the seizure without a hearing, following *Fuentes v. Shevin*. The entire analysis would have been unnecessary if the Fourth Amendment simply made notice and a hearing superfluous.

In *$8850*, the court found it necessary to explain why no hearing was required by due process before the initial seizure by referring to the impracticality of such a hearing, again applying the *Fuentes* test. 461 U.S. at 562 n. 12. To justify the continued possession by the government after the initial seizure without a hearing, the court again applied a balancing test. 461 U.S. at 563-571.

5. The government does not attempt to sketch the outer limits of its proposed rule, but it would be irresponsible to discuss its shortcomings from the standpoint of legal history and precedent without also pointing out where its adoption would necessarily lead.

To take but one example: under the government's rule, U.S. marshals could march into the home of a family which had utterly no knowledge of or involvement in crime, and force them immediately into the streets, with no prior notice or hearing, as long as a magistrate had issued a warrant finding probable cause that the property had at some time been used in some way which justified forfeiture. While the government's present policy is not to dispossess occupants, under the government's rule, the *Mathews v. Eldridge* balancing test

would not apply, and the severity of the owner's loss would be irrelevant. Although an "innocent owner" exception presently exists under 21 U.S.C. §881(a)(7), there appears to be no constitutional prohibition against Congress or a State legislature enacting a law that would forfeit property of innocent homeowners, as they have for other kinds of property (at least according to *Calero-Toledo*). At any rate, an innocent owner cannot forestall the initial seizure under the *ex parte* procedure presently employed by the government.

The foregoing example is not a strawman. 21 U.S.C. §881(b) says the government may do exactly what has just been described (and does not even require the magistrate's ruling). The innocent owner can be dispossessed until trial on the merits, unless his or her case can be proven by undisputed facts on summary judgment. The only thing which would prevent the foregoing from passing constitutional scrutiny is this court's adherence to the "root requirement" of the Due Process Clause and rejection of the government's Fourth Amendment argument.

The new rule proposed by the government has an immense scope. Virtually everything done by the Executive Branch in the domestic sphere can be termed "law enforcement," whether civil or criminal. Presently, more than a hundred federal statutes authorize civil forfeiture, 1 D. Smith, ¶1.02 at 1-27, and innumerable federal statutes contain criminal penalties. The forfeiture program already has a vast scope. At the end of FY 1990, the Department of Justice had an inventory of seized property worth more than $1.3 billion, including 3,800 real properties. 1 D. Smith, ¶1.02 at 1-21.

The government is here proposing an extraordinary expansion of its power: to expel the Due Process Clause from forfeiture law, and to also expel it from a vastly wider, though still dimly defined realm of governmental takings.

E. Good Should Be Awarded the Back Rent If He Prevails on the Due Process Issue.

The government never offered any argument in the lower courts against Good's claim for his back rent if the seizure was found illegal. It did not offer any argument in its opening brief to this Court against the Ninth Circuit's award of those back rents, and did not cite this aspect of the decision as an error in its petition for a writ of certiorari. The government must be held to have waived any opposition on the point. *Bogle v. Scheer*, 512 So.2d 1336, 1337 (Ala. 1987) (issues not raised in appellant's brief are waived). It would hardly be appropriate for the government to raise the issue for the first time in its reply brief, when respondent will have no chance to answer.

If this court affirms that the seizure without prior hearing was invalid, it should also let stand this part of the judgment below. To hold otherwise would leave Good with no remedy for the unlawful seizure, and reward the government with the fruits of its unlawful action.

II. THIS ACTION MUST BE DISMISSED IF NOT TIMELY COMMENCED UNDER 19 U.S.C. §1602-1604.

A. 19 U.S.C. §1602-1604 Require Prompt Commencement of Forfeiture Actions.

The court of appeals correctly ruled that 19 U.S.C. §1602-§1604 require the government to promptly file a forfeiture complaint after learning of grounds for forfeiture. 21 U.S.C. §881(d) applies "the provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws" to forfeitures under 21 U.S.C. §881(a), except that the duties of customs officers become the duties of persons authorized or designated by the Attorney General.

Among the customs laws so incorporated are 19 U.S.C. §1602-§1604. *United States v. One 1971 BMW 4-Door Sedan*, 651 F.2d 817, 819 (9th Cir. 1981).

19 U.S.C. §1602 requires officials "authorized by law to make seizures" to "report every such seizure immediately to the appropriate customs officer." It also requires officials to "report immediately to such customs officer every violation of the customs laws."

19 U.S.C §1603(b) provides that "[w]henever ... a violation of the customs laws is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney ..."

Finally, 19 U.S.C. §1604 provides that "[i]t shall be the duty of the Attorney General immediately to inquire into the facts of cases reported," and to "forthwith" cause the proper proceedings to be commenced, "without delay," if the institution of proceedings in the district court is necessary.

The significance of the reference to "judicial proceedings" being "required" is that in some cases, property may be forfeited administratively without judicial proceedings. See 19 U.S.C. §1607, §1609, §1610. At the time of the complaint in this action, property could be administratively forfeited if valued at less than $100,000. 19 U.S.C. §1607(a). (The law was amended by the Customs and Trade Act of 1990, P.L. 101-381, August 20, 1990, to raise the limit to $500,000.) The government obviously did not consider Good's property subject to administrative forfeiture. Although the language of 19 U.S.C. §1607(a) appears to require use of administrative rather than judicial forfeiture when the property is subject to administrative forfeiture, the government proceeded under 19 U.S.C. §1610, which applies when the property may not be administratively forfeited.

Good's property consisted of a large home and four acres of land (R. 29, Ex. "I" at 7-10, 84-87) worth well over $100,000, so it could not have been administratively forfeited. Therefore, judicial procedures were always necessary, and under the plain language of the statutes, should have been promptly initiated after the discovery of the violation. The government has not contended that there was ever any doubt that judicial proceedings would eventually be required to forfeit Good's property, or that any delay was caused by a need to appraise the property.[10]

The government has apparently abandoned its argument raised below that the "prompt reporting" command only addressed the duties of officials when a seizure had already occurred. In plain language these statutes also require the official "to report immediately to such customs officer every violation of the customs laws," 19 U.S.C. §1602; §1603(b); *United States v. James Daniel Good Real Property* at 1381.

The language of 21 U.S.C. §881(a)(7) also supports a requirement that forfeitures be promptly commenced. 21 U.S.C. §881(a)(7) provides that property is subject to forfeiture if it "is used, or intended to be used," to facilitate a felony drug crime. In *United States v. Tax Lot 1500*, 861 F.2d at 236 (Ferguson, J., concurring), Judge Ferguson commented that this language indicates that to institute forfeiture, there should be some current or contemplated use of the property for illegal purposes. He stated that federal forfeiture proceedings, to be timely, should be "initiated shortly after filing, but prior to termination," of state court criminal proceedings. 861 F.2d at 236.

21 U.S.C. §881(a)(7) does not provide that property is subject to forfeiture if it *had been used* for illegal purposes at some time in the past. The "used, or intended to be used"

[10] It is standing policy in the Department of Justice to initiate a judicial forfeiture action in real property cases rather than pursue administrative forfeiture. 1 D. Smith ¶6.01, at 6-2 to 6-3.

language suggests a Congressional intent that seizure and forfeiture commence when the illegal acts are discovered.

The government did not claim that Good's property was "used, or intended to be used" to commit a felony violation of Title 21 at any time after January 31, 1985, and criminal proceedings had long since been terminated. Under the concurring opinion in *Tax Lot 1500*, the property was no longer subject to forfeiture when forfeiture was commenced.

B. The Forfeiture Action Must Be Dismissed If Not Timely Commenced.

1. The government must *strictly comply* with every provision of the forfeiture laws. *United States v. $38,000 in U.S. Currency*, 816 F.2d 1538, 1545-47 (11th Cir. 1987). Forfeiture is a "harsh and oppressive sanction," and for this reason is not favored by the law. *United States v. $31,990*, 982 F.2d 851, 856 (2d Cir. 1993); *United States v. $48,595*, 705 F.2d 909, 914 (7th Cir. 1983); *United States v. One Rockwell Aero Commander*, 671 F.2d 414, 417 (10th Cir. 1982). A forfeiture should be allowed "only when within both letter and spirit of the law." *United States v. One 1936 Model Ford V-8 Deluxe Coach*, 307 U.S. 219, 226 (1939). A court should avoid declaring a forfeiture if at all possible. *United States v. One 1957 Rockwell Aero Commander*.

In this case, the reasonable, natural, and plain reading of the statute leads to the conclusion that the forfeiture is untimely. This construction of the statute enables the court to avoid a forfeiture, and it leads to a more equitable result: it prevents the further punishment of an individual who has already been punished once, four years after the criminal matter has been concluded.

Dismissal is the proper remedy for failure to follow statutory time limits in instituting forfeiture proceedings. *Lewanee*

Prosecutor v. One 1981 Buick 2-Door Riviera, 165 Mich. App. 762, 419 N.W.2d 458 (1988); *State v. Ellis*, 156 Ga.App. 779, 275 S.E.2d 361 (1980).

In *Lewanee Prosecutor v. One 1981 Buick 2-Door Riviera*, the statute required the government to "promptly" initiate forfeiture after the claimant posted bond. The court held that a four and one-half month delay violated the statute, and dismissal was the appropriate remedy because of the mandatory "shall" language in the statute. 419 N.W.2d at 460.

Governmental actions authorized by a statute must comply with all mandatory provisions of the statute or "the acts done will be invalid." *French v. Edwards*, 80 U.S. (12 Wall.) 506, 511 (1872). The promptness commands of 19 U.S.C. §1602-1604 are mandatory because they are "intended for the protection of the citizen, and to prevent a sacrifice of his property." *French v. Edwards* at 511. The use of the term "shall" in describing the duties of various governmental officials in 19 U.S.C. §1602-1604 is a "significant" indication that the language was intended to be mandatory. *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935) (Cardozo, J.).

In addition, 19 U.S.C. §1603(b) was amended to add promptness language in 1978[11] and the legislative history of the amendment demonstrates that it was enacted to force the government to promptly initiate judicial proceedings for the benefit of claimants. The committee report provided that "[t]his provision will insure that a violator will have an opportunity to secure judicial review as soon as the period for administrative review has elapsed." H.R. Rep. No. 621, 95th Cong., 1st Sess., at 17 (1977). The "prompt referral" clause of 19 U.S.C. §1603(b) was therefore expressly enacted to provide protection against

[11] Customs Procedural Reform and Simplification Act of 1978, P.L. No. 95-410, §110(b), 92 Stat. 896 (1978).

arbitrary delays. Dismissal of the action is the only conceivable remedy to implement that intent.

2. The government relies on two cases, *United States v. Montalvo-Murillo*, 495 U.S. 711, 110 S.Ct. 2072, 109 L.Ed.2d 720 (1990) and *Brock v. Pierce County*, 476 U.S. 253 (1986) for its contention that even if the government breached its obligation to proceed promptly, the action should not be dismissed.

In *Montalvo-Murillo*, the court held that a delay of a few days in holding a detention hearing did not mandate the release of a prisoner. One major factor in the decision, however, was that the judiciary had an independent role in ensuring prompt hearings. The *Montalvo-Murillo* court stated that it need not invent a remedy — release of the defendant — to coerce the government and the courts to hold a timely hearing, because "[m]agistrates and district judges can be presumed to insist upon compliance with the law." 110 S.Ct. at 2079. In Good's case, there is no role for judges and magistrates in deciding when forfeiture will be commenced: this is entirely a function of the executive branch. Unless this court provides the remedy of dismissal, there is no sanction for the government's disregard of the "promptness" requirement in 19 U.S.C. §1602-1604. In any case, the government's delay of more than four years in Good's case cannot be equated to the delay of a few days in *Montalvo-Murillo*.

Brock v. Pierce County held that a 120-day limit for the Secretary of Labor to take to take action on complaints alleging misuse of grants to local governments did not prevent the Secretary of Labor from acting after that time. However, the decision rested at least in part on the fact that the aggrieved local government had a remedy under the Administrative Procedures Act if there was an undue delay: it could sue to force the Secretary to make the determination. 476 U.S. at 260 n. 7. Here, Good has no such remedy.

C. The Decision in *$8850* Does Not Control this Case.

The government argues that this court's passing reference to the five year statute of limitations in *United States v. $8850*, 461 U.S. at 563 n. 13 controls the timeliness issue.

In *United States v. $8850*, a customs agent seized *$8850* in undeclared currency from a traveler. The traveler filed a petition for remission or mitigation shortly after the seizure. After an eighteen month delay, caused primarily by a criminal investigation, the government filed a forfeiture complaint.

This court considered "a narrow" issue of due process: whether the delay between seizure and the filing of the complaint violated due process. 461 U.S. at 562.

$8850 dealt with the question whether a prompt post-seizure hearing was required by the Due Process Clause, where the pre-seizure "bright line" does not exist. *Id.* Its holding is therefore not directly applicable to this case. Good has not claimed that the untimeliness of the government's actions creates a due process violation. Rather, he is claiming a statutory violation.

Nevertheless, because the *$8850* court stated that "it could not read" a shorter time frame into the statutes, citing the express five year statute of limitations in 19 U.S.C. §1621, the government argues that this is controlling authority against the Ninth Circuit's reading of 19 U.S.C. §1602-1604. This analysis is incorrect.

As noted by the *$8850* court itself, at the time of the seizure in question, 19 U.S.C. §1603 contained no requirement of a prompt report by the Customs Service to the United States attorney for purposes of instituting forfeiture proceedings. 461 U.S. 558 n. 3. Indeed, the *$8850* court noted that "§1603 now requires the appropriate customs officer 'to report promptly' to

the United States attorney whenever legal proceedings "in connection with such seizure or discovery are required." *Id.* (§1603 was amended by the Customs Procedural Reform and Simplification Act, P.L. 95-410, §110(b), 92 Stat. 896 (1978), to add the word "promptly" to the duty of the customs officer to report to the attorney general.)

The decision in *$8850* can scarcely be controlling authority for the proper construction of a statute which is now being considered after a critical amendment.

The government also argues that the *$8850* court did not regard the promptness requirements of §1602 and §1604 as creating a shorter statute of limitations. *Id.* However, without the amendment to §1603, there is no statutory language commanding a prompt referral to the United States attorney by the customs (or DEA) agents — a necessary link in the promptness argument.

The *$8850* court did not explicitly analyze the question whether 19 U.S.C. §1602-§1604 imposed a promptness requirement. It is not clear from the opinion whether the significance of 19 U.S.C. §1602-1604 was briefed or argued. "It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have raised and considered." *United States v. Mitchell*, 271 U.S. 9, 14 (1926).

Finally, as the court of appeals correctly analyzed, 19 U.S.C. §1621 is phrased in the negative: it provides that "[N]o action ... shall be initiated ... unless commenced within five years." It does not say that a suit may be instituted at any time within five years, or that no other timeliness requirement may exist. *United States v. James Daniel Good Real Property* at 1381. *Accord, United States v. Land and Bldg. at 2 Burditt St.*, 924 F.2d 383, 385 (1st Cir. 1991) (*dicta*).

D. Public Policy Supports a "Prompt Action" Requirement.

Public policy also supports a requirement that the government promptly institute forfeiture claims. Obviously, seizure and forfeiture are most effective in preventing the continued use of property to commit crimes, or in depriving criminals of financial assets used to commit crimes, if forfeiture is promptly commenced.

Owners of property used in drug crimes would have less time to convert the property to less traceable assets through sale or mortgage. Resources would be channeled toward stripping assets from active law-breakers, rather than from those, like Good, who have completed the rehabilitation process, and have become law-abiding citizens. The government would direct its attention to current violators, and not to stale cases like Good's.

The possibility that the government may forfeit property years after the termination of criminal proceedings can only discourage an owner from investing in the improvement of the property, and may thus blight the property for years. Properties may simply fester.

If the government prevails on the due process issue raised in this case, a home that is forfeitable under 21 U.S.C. §881(a)(7) is subject to search and seizure at any time without warning. The home becomes "tainted," and the occupants — no matter who they are — have no privacy protection against governmental search. Requiring prompt action reduces the duration of such a taint.

Delay also lends itself to abuse on the part of the government. Delay tends to favor the government in a forfeiture action because the claimant has the burden of proof; delay may cause loss of evidence useful to the claimant.

The punitive character of forfeitures cannot be denied. In Good's case, the government is seizing property allegedly used in the commission of a crime more than four and a half years after the offense, when the individual involved had nearly completed probation. It is in society's interest in promoting the rehabilitation of offenders to make clear the penalties which they must face, so that the offender may discharge his obligations, and go on to a productive life. The government has made a "late hit" on Good, who must have believed that he had already been punished for the offense.

The only practical objection raised by the government to the interpretation of 19 U.S.C. §1602-1604 adopted in the *Good* decision is that it "would create incentives to investigate possible violations of the law with undue haste." Brief for the United States at 43. The Ninth Circuit's decision does not require the government to act with undue haste. The court remanded the case to the district court to develop the factual record to determine whether the government's actions were untimely. The district court and circuit court will be able to scrutinize the factual record in this and other cases to determine whether or not the government acted with due promptness.

In this case, the government waited four and a half years after the discovery of the offense to begin forfeiture proceedings, for no apparent reason. It is to be hoped that this sort of unexplained delay will rarely occur. The most obvious possible reason — the pendency of criminal proceedings or investigations — cannot possibly apply to Good's case.

The power to seize homes and other private property for drug offenses is among the most sweeping asserted by the government. To prevent abuses in the exercise of that power such as occurred in this case, the court should force the government to follow every safeguard of the individual's rights contained in the Constitution and the governing statutes. The court should make the government follow the literal commands of 19

U.S.C. §1602-1604, and void the government's seizures when it violates those commands.

CONCLUSION

The judgment of the Court of Appeals should be affirmed. DATED this 10th day of June, 1993.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

I. Respondent first attempts (Br. 9-40) to defend the court of appeals' holding that the seizure of the respondent property violated the Due Process Clause. The due process issue is narrow. No one was ousted from actual possession when the premises were seized. Good did not even reside on the premises at the time, and, in accordance with Justice Department policy (see Gov't Br. 13-14 n.6), Good's tenants were permitted to remain on the premises during the pendency of the forfeiture proceeding. Compare *United States* v. *A Parcel of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1130 n.3 (1993) (plurality opinion). Moreover, and again in accordance with Justice Department policy concerning seizures of real property (see Gov't Br. 12-13 & n.5), the government,

before seizing the premises, obtained a warrant from a U.S. magistrate, based on a finding of probable cause to believe that the property was subject to forfeiture. The seizure therefore fully complied with the Fourth Amendment. Finally, there is no question presented concerning the timing of Good's *post*-seizure hearing.[1]

Accordingly, the question is whether the Due Process Clause rendered unconstitutional the seizure of the premises pursuant to a warrant lawfully issued and executed under the Fourth Amendment, because respondent was not afforded prior notice and an opportunity for a hearing. The answer to that question is no. The only consequence of the seizure was that Good's tenants thereafter paid their monthly rent to the U.S. Marshal, to be held in escrow, rather than to Good. This Court has repeatedly held that a claimant has no due process right to pre-seizure notice and a hearing when forfeiture proceedings result in the temporary loss of money or other personal property. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974); *United States* v. *$8850*, 461 U.S. 555, 562 n.12 (1983); *United States* v. *Von Neumann*, 474 U.S. 242, 249 n.7 (1986). And in this case, the warrant issued by a neutral and detached magistrate served to protect whatever further interests Good or his tenants might have had in the property due to its use as a residence.

A. Respondent asserts (Br. 32), however, that, "[b]y its terms, the Fourth Amendment does not even contemplate the seizure of real property." That assertion is refuted by the first Clause of the Amendment, which provides: "The right of the people to be secure in their persons, *houses*, papers, and effects, *against unreasonable*

[1] Any such claim would be governed by the four-part test in *United States* v. *$8850*, 461 U.S. 555, 564 (1983).

searches and *seizures*, shall not be violated" (emphasis added).

Respondent ignores the Amendment's first Clause and relies (Br. 32) instead on its Warrant Clause, which requires that any warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." In respondent's view, that language suggests that the Amendment "authorizes the search of a 'place,' but not its seizure; and the seizure of 'persons' and 'things,' but not 'places.'" Resp. Br. 32. A "house," however, is a "thing," and its seizure therefore is contemplated by the Warrant Clause.[2]

If respondent's narrow reading of the Warrant Clause were correct, the result would not be that seizures of houses are not contemplated by the Fourth Amendment, for as its first Clause shows, they are; the result, rather, would be that such seizures would not fall within the Warrant Clause, with the implication that a warrant is unnecessary in order for a seizure (as distinguished from a search) of a house to be "reasonable" under the first Clause. That, presumably, is not a construction that respondent would endorse.

Respondent argues (Br. 36-37) that the seizure was not authorized by Fed. R. Crim. P. 41(b) because the property did not constitute evidence of a criminal offense, contraband, or "property designed or intended for use or which is or has been used as the means of committing a

[2] Respondent's crabbed reading also is contrary to the broad protective purposes and historic application of the Fourth Amendment. This Court, for example, has enforced the Amendment with respect to business premises, even though they do not literally fall within the enumeration of "persons, houses, papers, and effects" in the first Clause. See, *e.g.*, *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 311-313 (1978); *Camara* v. *Municipal Court*, 387 U.S. 523, 543 (1967); 1 W. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 2.4(b), at 429 (2d ed. 1987).

criminal offense." To the contrary, a house in which a person manufactures, stores, or buys and sells drugs is "property * * * which * * * has been used as the means of committing a criminal offense" under 21 U.S.C. 841(a)(1). That Section makes it a crime to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," and gives rise to civil or criminal forfeiture under 21 U.S.C. 881(a)(7) or 21 U.S.C. 853(a)(2) of property "used, or intended to be used, * * * to commit" a violation. See J.A. 12 (complaint for forfeiture alleging property was used in violation of 21 U.S.C. 841); J.A. 31 (affidavit of DEA agent stating that Good pleaded guilty to "promoting a harmful drug").

In any event, the Fourth Amendment is not limited to criminal proceedings; its protection "applies in the civil context as well." *Soldal* v. *Cook County*, 113 S. Ct. 538, 546 (1992); see also *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 312 (1978); *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967). In 21 U.S.C. 881(b), Congress authorized the issuance of a warrant for the seizure of property for civil forfeiture in the same manner as is provided for a search warrant under the Federal Rules of Criminal Procedure. The effect is to make Rule 41 applicable to civil forfeiture. The seizure of the respondent property for forfeiture therefore was specifically regulated—and authorized—by procedures enacted by Congress to implement the Fourth Amendment. Respondent's submission that seizures for forfeiture are entirely outside the scope of the Fourth Amendment is, in short, without merit.

It is through the Fourth Amendment that the Framers of the Bill of Rights struck the balance they deemed appropriate between the people's security in their persons, houses, papers, and effects and the public interest in effecting searches and seizures for law enforcement purposes. *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 559 (1978); *United States* v. *United States District Court*, 407 U.S. 297, 314-315 (1972). Compliance with the standards and procedures prescribed by the Fourth Amendment constitutes all the "process" that is "due" a forfeiture claimant under the Fifth Amendment. Respondent therefore errs in relying (Br. 10-12) on the generalized due process principles of *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and its progeny.

The Court made that very point in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), with respect to the detention of a criminal defendant pending trial. The Court observed that "[t]he historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits," and that the Fourth Amendment's "balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial." *Id.* at 125 n.27. Respondent seeks to distinguish *Gerstein* by quoting a further passage in that opinion, in which the Court pointed out that "the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." Resp. Br. 35 (quoting 420 U.S. at 125 n.27); see also ACLU Br. 14-15. That passage, however, addresses the *post*-seizure procedural protections in criminal prosecutions, not the *pre*-seizure provisions that are at issue here. Both criminal prosecutions and civil forfeiture proceedings involve elaborate post-seizure protections against adjudicative error. The difference in the nature of those protections reflects the different intensity of the private interests at stake and the different constitutional provisions that

govern; it in no way undercuts the proposition that the Fourth Amendment fully regulates the seizure itself in both settings.

In other contexts as well, the Court has repeatedly held that the specific protections of the Fourth Amendment, rather than the general terms of the Due Process Clause, govern the seizure of persons and property. See *Graham* v. *Connor*, 490 U.S. 386, 394-395 (1989); *Baker* v. *McCollan*, 443 U.S. 137, 143-146 (1979); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 n.18 (1977); Gov't Br. 25-27. In *Soldal* the Court observed—in the specific context of the seizure of a home—that it had chosen in *Graham* "the more 'explicit textual source of constitutional protection' over the 'more generalized notion of "substantive due process"'" (113 S. Ct. at 548 (quoting *Graham*, 490 U.S. at 395)); and the Court again chose in *Soldal* to "resort * * * to the Fourth Amendment's specific protection for 'houses, property [*sic*], and effects' rather than the general protection of property in the Due Process Clause." 113 S. Ct. at 548.

Even if the Court were to conclude that its Fourth Amendment precedents are not strictly applicable, the forfeiture setting is, at the very least, closely analogous to those in which the Court has sustained the constitutionality of seizures under Fourth Amendment standards. The deeply rooted practice of relying on the protection afforded by a warrant, issued by a neutral and detached magistrate on the basis of probable cause, strongly supports the conclusion that due process was fully satisfied here by use of the same procedure to determine the existence of the requisite probable cause.

B. The Court has already expressly held that "seizure for purposes of forfeiture is one of those '"extraordinary situations" that justify postponing notice and opportunity for a hearing.'" *Calero-Toledo*, 416 U.S. at 677 (quoting *Fuentes*, 407 U.S. at 90). Respondent maintains

(Br. 38) that the Court engaged in a "balancing" analysis to justify the particular seizure in *Calero-Toledo*. In fact, however, the Court stated the rule against pre-seizure notice and hearing in categorical terms. It then identified three considerations, discussed below, that support that general rule. 416 U.S. at 679.[3]

The court of appeals did not question that the first and third of those considerations are present here as well. Neither did respondent in the brief in opposition. Both sought to distinguish *Calero-Toledo* solely by reference to the second consideration. See Pet. App. 14a-15a; Br. in Opp. 10-11. Now, however, respondent claims (Br. 11-23) that none of the three considerations identified in *Calero-Toledo* is present here. Even if we assume, *arguendo*, that respondent is correct that an ad hoc balancing approach is appropriate, it does not follow that a different "balance" should be struck in this case. There are other factors present here (but absent in *Calero-Toledo*) that weigh heavily in support of the same result in this case as in *Calero-Toledo*—namely, no one was deprived of possession of the seized property, and the additional protection of a warrant was afforded. In any event, there is no merit to respondent's contention that the *Calero-Toledo* rationale is inapplicable here.

[3] Respondent relies (Br. 21-22) on the concluding sentence of the Court's due process discussion in *Calero-Toledo* (416 U.S. at 679-680): "In these circumstances, we hold that this case presents an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process." In context, however, the Court was simply stating that *Calero-Toledo* presented an "extraordinary situation" warranting postponement of notice and hearing because it fell within the category of "seizure[s] for purposes of forfeiture" for which the Court previously had stated a general rule against a requirement of prior notice and hearing. See 416 U.S. at 677.

1. First, here, as in *Calero-Toledo*, seizure "serves significant governmental purposes" by "permit[ting] [the government] to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions." 416 U.S. at 679 (footnote omitted); see also *Republic National Bank* v. *United States*, 113 S. Ct. 554, 557 (1992). Respondent contends (Br. 13) that "[i]n the case of real property, *in rem* jurisdiction over the property itself can always be obtained after giving the owner a hearing to contest the seizure." But respondent does not explain how the court would have jurisdiction to conduct such a hearing without first obtaining *in rem* jurisdiction over the property.

Respondent also contends (Br. 14-15) that jurisdiction could be obtained in a manner that is "far less intrusive" than seizure—*e.g.*, by posting a warrant of arrest on the property. This Court has stated that prior seizure of the premises by executive officials is necessary for institution of forfeiture proceedings. *Dobbins's Distillery* v. *United States*, 96 U.S. 395, 396 (1878); see also 1 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 9.01[2], at 9-4 to 9-7 (1992). It may be that, in some circumstances, a court can acquire bare jurisdiction over real property through service of a warrant of arrest. See *United States* v. *Twp 17 R 4, Certain Real Property in Maine*, 970 F.2d 984, 986 & n.4, 989 (1st Cir. 1992) (warrant of arrest posted on vacant land). But seizure ordinarily would be necessary for the court to acquire and exercise meaningful custody over the premises and to ensure against its continued use for illegal purposes. See generally *Smith*, *supra*, ¶ 9.01[4], at 9-9 to 9-16.

For these reasons, and because some form of physical seizure has historically accompanied the institution of

forfeiture proceedings, the first consideration identified in *Calero-Toledo* is present in this case as well. And it is reinforced by the fact that the seizure was "far less intrusive" (Resp. Br. 15) here than in *Calero-Toledo*, where the government obtained complete possession of the property, to the exclusion of the owner and the lessee.

2. Because the property seized in this case cannot be moved, respondent dismisses (Br. 15-19) as irrelevant the second consideration identified in *Calero-Toledo*: that "preseizure notice and hearing might frustrate the interests served by the [forfeiture] statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." 416 U.S. at 679. The Court did not suggest in *Calero-Toledo*, however, that it was necessary for the government to show in every case that removal, concealment, or destruction of the property was likely in order for a seizure to be justified without prior notice and hearing; it simply observed that property subject to forfeiture "will often be of a sort" that raises those concerns. The quoted passage thus confirms that the Court stated a categorical rule in *Calero-Toledo*, based on the characteristics of forfeited property generally.

Moreover, although a residence cannot normally be "removed" to another jurisdiction (but see *Soldal* v. *Cook County*, *supra*), a residence, just like a yacht, can be "destroyed," and its contents (which may also be subject to forfeiture or constitute evidence of a crime) can be "concealed." Respondent attempts to discount (Br. 16) those concerns by pointing to the government's practice of allowing occupants to remain in possession pending final disposition of the forfeiture proceeding. Respondent ignores the fact that the government enters into such occupancy agreements only *after* seizure, and therefore

after the government has had an opportunity to ensure that the premises are safe and sound and are not still being used for illegal purposes. And as respondent acknowledges (Br. 16), the occupancy agreement obligates the owner or occupant to maintain the premises and to refrain from illegal use in the future.

3. Finally, "unlike the situation in *Fuentes*, seizure [for forfeiture] is not initiated by self-interested private parties; rather, [government] officials determine whether seizure is appropriate under the provisions of the [federal] statutes." *Calero-Toledo*, 416 U.S. at 679. Respondent pays little attention to this language, and instead quotes a passage from *Fuentes* that was recited earlier in the *Calero-Toledo* opinion. In that passage, the Court observed that the circumstances in which immediate seizure of property had been permitted in the past were those in which, *inter alia*, the person initiating it was "a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." *Fuentes*, 407 U.S. at 91. Respondent argues (Br. 19-21) that that standard is not satisfied here because 21 U.S.C. 881(a)(7) is not "narrowly drawn."

That argument ignores the fact that the operative passage in *Calero-Toledo* makes no mention of a "narrowly drawn" statute; it notes only that government officials, rather than interested private parties, institute seizures for purposes of forfeiture.[4] In addition, the issuance of a seizure warrant by a magistrate in this case more than satisfied whatever protective purposes might be served in other settings under respondent's view that the

[4] Significantly, the Court did not discuss in *Calero-Toledo*, *$8850*, or *Von-Neumann* whether the relevant statute was "narrowly drawn."

statute under which the seizure takes place must itself be narrowly drawn.[5]

4. In sum, the seizure in this case falls within a general category, consisting of "seizure[s] for purposes of forfeiture," that need not be preceded by notice and an opportunity for a hearing under the Due Process Clause. See also *$8850*, 461 U.S. at 562 n.12; *Von Neumann*, 474 U.S. at 249 n.7; Gov't Br. 30-31. That conclusion is consistent with our submission in Point A that the Fourth Amendment, not the Due Process Clause, furnishes the governing standards for all such seizures.[6]

C. Finally, and contrary to respondent's contention (Br. 23-30), the three-part "balancing" test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), leads to the same conclusion.

1. The "private interest" at issue, 424 U.S. at 335, is relatively minor, since Good was not residing on the premises and his tenants remained in possession. Under Justice Department policy, the only change wrought by a typical seizure is that continued occupancy is subject to an agreement that recognizes the government's interest in protecting its claim to the property and obligates the

[5] Respondent suggests (Br. 21) that the third factor identified in *Calero-Toledo* should be reconsidered because, although forfeiture is "not initiated by self-interested private parties," DEA is a "self-interested *public* party" by virtue of its eligibility to receive a portion of the deposits in the Asset Forfeiture Fund. See 21 U.S.C. 881(e). The potential impact that the receipt of such funds by DEA as a whole might have on any particular agent who might seize property is too remote and speculative to raise any due process issue in this regard. See *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980).

[6] Significantly, as the Court noted in *Calero-Toledo*, 416 U.S. at 679 n.14, *Fuentes* itself had distinguished a seizure under a search warrant from a seizure under a writ of replevin, in light of the special protections afforded by Fourth Amendment practice. See 407 U.S. at 93-94 n.30.

owner to maintain the property and refrain from making illegal use of it. In this case, Good's tenants thereafter made their rental payments to the U.S. Marshal in escrow; but the consequence for Good was no different from the loss of the use of the cash in *$8850*, which this Court held did not require prior notice and a hearing.[7]

Respondent argues (Br. 24) that as a result of the seizure, Good lost his rights under Hawaii law to enforce the tenants' obligation for maintenance of the dwelling, to have reasonable access to inspect and ensure proper use of the premises, and to re-enter at the end of the lease. Because Good was not divested of ownership until the judgment of forfeiture was entered, see *92 Buena Vista Ave.*, 113 S. Ct. at 1134-1137 (plurality opinion), we see no reason why he could not have enforced those rights prior to judgment; and as respondent points out (Br. 3), the government was willing to allow Good to resume occupancy following the seizure and before final judgment. Respondent also objects (Br. 24) that Good was "restrained from transferring the property" as a result of the seizure. But respondent elsewhere concedes (Br. 37-38) that "[t]he government had prevented Good

[7] Although respondent states (Br. 24) that rents from the premises were an important source of income for him, he acknowledges (Br. 25) that it is necessary under *Mathews* v. *Eldridge* to look to "cases generally," "not just the case involving the particular claimant." There is no suggestion in *Calero-Toledo*, *$8850*, or *Von Neumann* that any hardship allegedly resulting from a particular seizure would require prior notice and a hearing in that case. It would not in any event be possible for DEA to ascertain the potential for such hardship prior to seizure. The other cases respondent cites (Br. 24-25) in support of the claim that alleged hardship weighs in favor of prior notice and hearing—*Fuentes* v. *Shevin*, *supra*; *Connecticut* v. *Doehr*, 111 S. Ct. 2105 (1991), and *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969)—all involved disputes between private parties and therefore are of little relevance to this case.

from alienating his property by the filing of a 'Notice of Pendency of Action' on the day the complaint was filed," and that "[f]urther seizure to prevent alienation was unnecessary."

2. The second *Mathews* v. *Eldridge* factor—"the procedures used, and the probable value, if any," of an adversary hearing, 424 U.S. at 335—likewise provide no support for respondent's position. In *Gerstein* v. *Pugh*, this Court considered those factors in the context of seizures of a person pending trial, which are governed by the same legal standard—probable cause—that governs here. The Court concluded that the existence of probable cause "can be determined reliably without an adversary hearing," and that "[t]he use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also the nature of the determination itself." 420 U.S. at 120, 121. Although additional procedures might enhance the reliability of probable cause determinations in some cases, the Court determined that "[i]n most cases * * * their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause." *Id.* at 122. Indeed, a prior adversary hearing would have served no purpose at all in this case. Good had pleaded guilty to a drug offense based on the conduct that gave rise to forfeiture, and the warrant application was supported by an affidavit describing the evidence seized from the house. See Gov't Br. 34 n.22.

Respondent does not address the analysis in *Gerstein* v. *Pugh*. Respondent simply asserts (Br. 25-28), with no empirical support, that an adversarial hearing would reduce the risk of erroneous deprivation to some unspecified degree. Moreover, the Justice Department's policy of obtaining a warrant guards against a number of

the risks to which respondent adverts—that the government might seize property when the underlying criminal activity never occurred, that the property might lack sufficient nexus to criminal activity, that the tract seized would extend beyond that actually involved in criminal activity, and that the property might belong to an innocent owner.

Respondent points out (Br. 26) that the Court found an ex parte determination of probable cause inadequate in *Connecticut* v. *Doehr*, 111 S. Ct. at 2114. But the procedure there called for little more than conclusory affidavits and a watered-down version of the probable-cause standard. *Doehr* in no way undermines the integrity and reliability of the established procedure for obtaining a warrant from a U.S. magistrate in accordance with the Fourth Amendment and its attendant safeguards. See Gov't Br. 22-23. Compare *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 612, 615-618 (1974); *FDIC* v. *Mallen*, 486 U.S. 230 (1988); *Commissioner* v. *Shapiro*, 424 U.S. 614, 629-630 & nn.11-12, 633-634 (1976); cf. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 606-608 (1975); *Bell* v. *Burson*, 402 U.S. 535, 540, 542 (1971); *Mathews* v. *Eldridge*, 424 U.S. at 334.

3. The "Government's interest," *Mathews* v. *Eldridge*, 424 U.S. at 335, points in the same direction. By operation of 21 U.S.C. 881, the government itself claims title to the property. Compare *Connecticut* v. *Doehr*, 111 S. Ct. at 2115. Contrary to respondent's contention (Br. 29-30), the government has a strong interest in protecting the property, see *W.T. Grant Co.*, 416 U.S. at 607-608; *Calero-Toledo*, 416 U.S. at 679, acquiring jurisdiction over it, and preventing its use for illegal purposes, *ibid.* At the same time, a requirement that novel procedures for pre-seizure notice and opportunity for a hearing be instituted, outside the normal progression of forfeiture cases that has been followed for two centuries (see Gov't Br. 20 n.12), would impose a substantial burden on both the courts and the Executive Branch. Respondent has failed to justify such a radical departure from "[h]istorical and contemporary practice." *Connecticut* v. *Doehr*, 111 S. Ct. at 2115.

II. Respondent also fails (Br. 40-50) to mount a persuasive defense of the court of appeals' unprecedented ruling that this action must be dismissed if the district court should conclude on remand that it was not timely commenced under 19 U.S.C. 1602-1604.

A. In holding that this suit is subject to dismissal, even though it concededly was filed within the five-year statute of limitations in 19 U.S.C. 1621, the court of appeals relied principally on 19 U.S.C. 1603(b). See Pet. App. 4a-12a. Respondent reads Section 1603(b) to impose a duty on DEA or FBI agents, when they first learn of a drug violation, to report it "promptly" to the U.S. Attorney. See Resp. Br. 40-41. However, under 19 U.S.C. 1603(b), the duty to report "promptly" is triggered only when "a seizure * * * for violation of the [drug] laws is made, or a violation of the [drug] laws is discovered," *and* "legal proceedings by the United States attorney in connection with such seizure or discovery are required."

Unlike the court of appeals (see Pet. App. 9a), respondent recognizes (Br. 41) that the reporting duty is triggered only when judicial proceedings are "required" following a seizure or discovery of a violation. But respondent insists (Br. 41) that the only "significance of the reference to 'judicial proceedings' being 'required' is that in some cases, property may be forfeited administratively without judicial proceedings." Respondent believes it was evident from the outset that judicial proceedings would be "required" in this case, because the property was worth more than $100,000 (then the maximum value of property subject to administrative forfeiture, 19 U.S.C. 1607 (1988)), and because the Justice

Department, as a matter of policy, seeks forfeiture of real property only in judicial proceedings. See Resp. Br. 41-42 & n.10.

In the forfeiture context, when a violation of the customs (or drug) laws has been discovered, judicial proceedings by the U.S. Attorney are not "required" until after the property has been seized and, in addition, (i) it is determined that administrative forfeiture procedures cannot be utilized (because the value of the property exceeds the statutory limit), or (ii) administrative forfeiture procedures have been instituted by the seizing agency, but a claimant has asserted an interest in the property and filed a cost bond. See Gov't Br. 37 n.23. Once those steps have occurred, legal proceedings in court are "required" both to perfect the title to the property that the government has advanced by seizing the property, see *92 Buena Vista Ave.*, 113 S. Ct. at 1134-1137 (plurality opinion), and to afford any claimants the opportunity for a post-seizure hearing that is mandated by the Due Process Clause and *$8850*. Prior to seizure, however, no provision of the Constitution or an Act of Congress "requires" that judicial proceedings be instituted.[8] Because there was no seizure in this case prior to filing the forfeiture action, judicial proceedings were not "required," and the duty to

[8] Even after a case has been reported to the Attorney General, she is not required by 19 U.S.C. 1604 to file a forfeiture proceeding or other legal action. Section 1604 provides that the Attorney General shall immediately inquire into the facts and file an action "forthwith" if she concludes that any fine, penalty, or forfeiture has been incurred by reason of the violation, "unless, upon inquiry and examination, the Attorney General decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted."

report a violation "promptly" to the U.S. Attorney therefore was never triggered.[9]

B. Even if the reporting duty in 19 U.S.C. 1603(b) was triggered prior to the institution of this forfeiture action, a failure to make such a report "promptly" does not give a claimant the right to have a forfeiture action dismissed.

In *French* v. *Edwards*, 80 U.S. (13 Wall.) 506 (1872), this Court noted that there are "many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual." *Id.* at 511. Significantly, the Court included in that category "regulations

[9] Respondent also makes a distinct untimeliness argument, relying on Judge Ferguson's concurring opinion in *United States* v. *Tax Lot 1500*, 861 F.2d 232, 236 (9th Cir. 1988), cert. denied, 493 U.S. 954 (1989). That argument turns on the language in 21 U.S.C. 881(a)(7) stating that real property is subject to forfeiture if it "is used, or intended to be used," to facilitate a felony drug crime. Judge Ferguson suggested that this language may require some current or contemplated use for illegal purposes at the time of forfeiture, and that to be timely, forfeiture proceedings should be "initiated shortly after filing, but prior to termination," of state criminal proceedings. 861 F.2d at 236. Respondent contends that because the property was last used to commit a drug offense in 1985, it was no longer subject to forfeiture under Judge Ferguson's analysis when this forfeiture action was filed.

The court of appeals correctly rejected that argument. Pet. App. 5a n.2. Section 881(a)(7) provides that when real property "is used, or intended to be used," to commit or facilitate commission of a felony drug crime, it becomes subject to forfeiture, and no property right exists in the property. Under 19 U.S.C. 1621, the United States then has five years from the date of discovery within which to bring a forfeiture action to perfect its title. It is not necessary that the property still be "used, or intended to be used," to commit a drug offense at the time the forfeiture proceeding is brought.

designed to secure order, system, and *dispatch* in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected." *Ibid.* (emphasis added).[10] "Provisions of this character," the Court explained, "are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated." *Ibid.*[11]

The provisions of 19 U.S.C. 1602-1604 on which respondent relies are designed to secure "dispatch" in enforcement of the customs (and drug) laws, and they are not "accompanied by negative words" stating that a forfeiture action shall *not* be filed if the underlying violation has not been "promptly" reported to the U.S. Attorney. Under *French*, then, the failure to make such a report is not a bar to suit. See also *Brock* v. *Pierce*

[10] Contrary to respondent's suggestion, the requirements of "dispatch" in 19 U.S.C. 1602-1604 are not "intended for the protection of the citizen, and to prevent a sacrifice of his property." Br. 44 (quoting *French*, 80 U.S. (13 Wall.) at 511). As we explain in the text, that is the function of the statute of limitations. See Gov't Br. 40-41. Rather, as the court of appeals acknowledged, 19 U.S.C. 1602-1604 impose "internal" reporting and filing requirements (see Pet. App. 5a); they are intended for the benefit of the government itself. See Gov't Br. 40-43.

[11] Respondent seeks to distinguish *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), on the ground that the magistrate and district judge play a role in ensuring compliance with time limits under the Speedy Trial Act, 495 U.S. at 721, and *Brock* v. *Pierce County*, 476 U.S. 253 (1986), on the ground that an aggrieved local government could bring an action under the Administrative Procedure Act to compel agency action if there had been undue delay, 476 U.S. at 260 n.7. There is a comparable remedy, however, where the property has been seized but forfeiture proceedings have not yet been instituted. See *$8850*, 461 U.S. at 568-569. Where, as here, the property has not been seized, there is no substantial likelihood of irreparable injury that could form the basis for such relief.

County, 476 U.S. 253, 259 (1986) (statute "specified no consequences for the failure" to comply with deadlines). By contrast, the statute of limitations in 19 U.S.C. 1621 does provide that "[n]o suit or action to recover any * * * forfeiture * * * shall be instituted" unless it is commenced within five years after the time when the alleged offense was discovered. Thus, a comparison of 19 U.S.C. 1602-1604 with 19 U.S.C. 1621 strongly reinforces the conclusion that only the latter confers a right on a claimant to have a forfeiture action dismissed on untimeliness grounds.[12]

In respondent's view (Br. 44), dismissal nevertheless is indicated by the use in 19 U.S.C. 1602-1604 of the term "shall" in describing the duties of the various government officials. That argument, however, was rejected in both *Pierce County* and *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), where the relevant statutes likewise used the term "shall" but the Court concluded that the government did not lose the power to act if the mandatory duties were not complied with. The Court was "most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." See *Montalvo-Murillo*, 495 U.S. at 718 (quoting *Pierce County*, 476 U.S. at 260). Thus, although respondent may be correct that the prompt reporting of drug violations and prompt filing of forfeiture actions serves important public purposes by removing property from the hands of criminals, halting its continued use for illegal purposes, and preventing conversion of the property into non-traceable assets (see Resp. Br. 48), it

[12] Contrary to respondent's contention (Br. 46-47), that conclusion also is strongly supported by this Court's disposition of the statutory timeliness issue in *$8850*. See Gov't Br. 43-45.

does not follow that a forfeiture action must be dismissed if it was not instituted with what a court might believe to be the appropriate degree of promptness. Dismissal would both confer a windfall on persons who used their property for illegal purposes and altogether foreclose (not merely delay) the accomplishment of the important public purposes underlying the forfeiture laws.

As long as the forfeiture action remains timely under the five-year statute of limitations in 19 U.S.C 1621, claimants are protected, to the precise extent Congress deemed appropriate, against the consequences of delay about which respondent speculates (see Resp. Br. 48-49). There accordingly is no basis in the statutory scheme for dismissal of the forfeiture action. That is especially so where, as here, the property in question was not seized and retained in government custody before the forfeiture action was commenced.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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Solicitor General

JULY 1993

Supreme Court, U.S.
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No. 92-1180

In the

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA

Petitioner,

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF Kentucky, Arizona, California, Connecticut, Indiana, Kansas, Louisiana, Maryland, Commonwealth of Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Commonwealth of Pennsylvania, Wyoming, and Territory of American Samoa IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

This case is of interest to the amici states because they have significant and compelling governmental concerns which must be considered in determining what process is due when real property, subject to forfeiture based on violations of drug laws, is seized. This case presents the important issue of whether the Due Process Clause of the Fifth Amendment requires notice and an opportunity to be heard *before* such real property is seized, where the seizure is made pursuant to a warrant based upon a finding of probable cause by a neutral and detached magistrate.[1]

As the Court has previously observed, the distribution and use of illegal drugs in our country is "one of the greatest problems affecting the health and welfare of our population." *Treasury Employees v. Van Raab*, 489 US 656, 668 (1989). The forfeiture of real property used in the illicit drug industry is but one part of the effort by the states and the federal government to combat this most serious problem. The states bear a heavy financial burden in directly fighting the illicit drug industry, not to mention the costs of the collateral damage of illegal drugs. Federal and State forfeiture laws provide a way to attack drug trafficking by removing real property assets which facilitate the illicit drug industry. The forfeiture of real property used in the illicit drug industry serves to remove the incentive to engage in a criminal activity motivated by the prospect of incredible monetary rewards. Forfeiture also helps to control the harms posed by real property used in drug trafficking such as crack houses. Forfeiture is also a mechanism to compensate, at least in

[1]The states, in this brief, address only whether the Due Process Clause of the Fifth Amendment requires preseizure notice and hearing before real property may be seized for forfeiture. The amici states do not address the second question presented in this case of whether the provisions of the federal customs laws, 19 U.S.C. § 1602-1604, establish a statutory basis for dismissal of a federal forfeiture action where the five year limitations period in 19 U.S.C. § 1621 has been satisfied.

part, the states for the direct and indirect costs of the illegal drug industry since the states bear not only the costs of enforcement but also the attendant costs of testing, caring for, and rehabilitating the victims of the illegal drug industry.

Should the Court conclude that the Due Process Clause of the Fifth Amendment mandates notice and an opportunity for a hearing before real property may be seized for forfeiture, the implementation of both federal and state forfeiture statutes will be impaired. In recognition of the critical role of state and local law enforcement officials in combatting the illicit drug industry, Congress has provided that property forfeited pursuant to the federal statute may be transferred "to any state or local law enforcement agency which participated in the seizure or forfeiture of the property, ..." 21 U.S.C. § 881(e)(1). As one observer has noted, the 1984 and 1986 amendments authorizing the sharing of forfeited assets has been used extensively and has financially benefitted local police and other local law enforcement agencies.[2] The amici states believe that requiring notice and hearing before real property subject to forfeiture may be seized would seriously impair the ability to target the real property assets of the illegal drug industry under the federal civil forfeiture statute.

The amici states also believe that this unwarranted interpretation of the Due Process Clause of the Fifth Amendment advanced by respondent, and adopted by the Ninth Circuit, seriously impairs the ability of the states to target the real property assets of the illegal drug industry under their own state forfeiture statutes. In every state but one civil forfeiture provisions have been enacted

[2]Michael Zander, *Confiscation and Forfeiture Law*, at 31, (The Police Foundation 1989).

as part of an anti-drug effort.[3] Forty-three of the states have statutes permitting the forfeiture of real property used in the illegal drug trade.[4] The use of forfeiture as a tool to combat criminal activity has been long used by the states. The various colonial governments enacted forfeiture statutes even before the American Revolution. While the present state forfeiture statutes vary from the detailed to the more general,[5] such legislation reflects a decision by the various states to utilize the forfeiture laws as part of their effort to fight the invasion of the illicit drug industry. Any decision by this Court as to what process is due when real property subject to forfeiture is seized will have direct consequences for the states' anti-drug efforts under both the federal and state forfeiture statutes.

Forfeiture is a critical remedy which the states have an interest in seeing applied to the profit-driven illicit drug industry. Whether the subject of the real property to be forfeited is an urban crack house or a rural farm growing, processing, and storing marijuana, the goal is the same - to remove criminal assets indispensable to the commission of drug offenses. In light of the compelling societal interests at stake, when real property is seized subject to forfeiture for violation of drug laws prior notice and hearing is not mandated as a matter of federal constitutional law, the amici states submit.

SUMMARY OF ARGUMENT

The Due Process Clause of the Fifth Amendment does not require preseizure notice and hearing since the states' compelling interest in fighting the illicit drug

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[3]United States Department of Justice, *Sourcebook of Criminal Justice Statistics, 1990*, at 142.

[4]*Id*. at 144.

[5]Note, *Constitutional Rights and Civil Forfeiture Actions*, 88 Columbia L.Rev. 390, 392 (1988).

industry outweighs any personal interest in the real property. Due process of law is, of course, a flexible concept that varies with the particular situation. Preseizure notice and hearing is not constitutionally mandated since the seizure of the real property assets of the illicit drug industry: 1) fosters the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions; 2) preseizure notice and hearing would frustrate the purposes of the forfeiture statutes since the property could be destroyed or law enforcement officers placed in danger; 3) and the seizure is initiated by government officials and not self-interested private parties. *Calero - Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

The initial seizure of the real property assets of the illicit drug industry is limited only by the requirements of the Fourth Amendment. Where, as here, the initial seizure of the real property subject to forfeiture is pursuant to a warrant based upon a finding of probable cause, the Fourth Amendment's requirement of reasonable seizures is satisfied. Surely, if the government may seize a *person* based upon a finding of probable cause to believe that the person has committed a serious offense, then the government may seize *property* based upon a finding of probable cause to believe that the property is connected to the illicit drug industry. *See, United States v. Monsanto*, 491 U.S. 600 (1989).

The forfeiture of property used in criminal activity is a principle of law that has been recognized from biblical times, at English common law, and in the laws of this country. Over one-hundred years ago the Court upheld the forfeiture of a landlord's personal and real property due to the tenant's operation of an illegal distillery. *Dobbin's Distillery v. United States*, 96 U.S. 395 (1878). Today, federal and state statutes authorizing the forfeiture of the real property assets of the illicit drug industry serve the same purposes as the statute in *Dobbin's Distillery* - to prevent the further illicit use of the property and to impose an economic sanction. Federal and state

forfeiture laws are one way the public can strike back, through their government, at the illicit drug industry.[6]

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT DOES NOT REQUIRE NOTICE AND HEARING BEFORE THE GOVERNMENT MAY SEIZE FOR FORFEITURE THE REAL PROPERTY ASSETS OF THE ILLICIT DRUG INDUSTRY.

A. The Due Process Clause Of The Fifth Amendment Does Not Require Preseizure Notice And Hearing Since The States' Compelling Interest In Fighting The Illicit Drug Industry Outweighs Any Personal Interest In The Real Property.

Due process is, of course, a flexible concept that varies with the particular situation. *Zinermon v. Burch*, 494 U.S. 113 (1990); *Brock v. North Carolina*, 344 U.S. 424 (1953). The requirements of due process of law "are not technical, nor is any particular form of procedure necessary." *Inland Empire Council v. Millis*, 325 U.S. 697, 710 (1945). Due process of law guarantees "no particular form of procedure; it protects substantial rights." *NLRB*

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[6]Illegal drug production was the conduct giving rise to the forfeiture in this case, and the illicit drug industry is the largest and most powerful illicit industry. However, forfeiture of property is an important part of social strategies to control other financially motivated anti-social conduct as well, ranging from environmental crimes and pure food and drug violations to fraud to the classic organized criminal rackets enumerated in federal and state anti-racketeering laws.

v. Mackay Co., 304 U.S. 333, 351 (1938). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 US 886, 895 (1961); *Stanley v. Illinois*, 405 U.S. 645, 650 (1972).

Recognizing the flexible nature of due process of law, the Court rejected an argument that preseizure notice and an opportunity for a hearing was constitutionally mandated by the Fifth Amendment before a yacht believed to have been used to transport drugs was seized by the government. *Calero - Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). In rejecting the argument that due process required preseizure notice and hearing the Court considered three factors: 1) seizure of the property subject to forfeiture permits the government "to assert in rem jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions"; 2) "preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized - as here a yacht - will often be of a sort that could be removed to another jurisdiction, destroyed or concealed, if advance warning of confiscation were given"; and 3) unlike the situation in *Fuentes v. Shevin*, 407 U.S. 67 (1972), the "seizure is not initiated by self-interested private parties" but by government officials. *Calero - Toledo*, 416 U.S. at 679. The same analysis applies to this case, and leads to the same result - no preseizure notice and hearing is constitutionally required.

Consideration of these three factors demonstrate that there are compelling government interests at stake which tilt the balance in favor of seizure without prior notice and hearing. Given the health risks posed by illegal drug use and the very real threat of violence accompanying the drug trade, the government has a compelling interest in seizing real property associated with the illicit drug industry in an effort to protect the public's health and general welfare. Surely, the need to control

the illicit drug industry stands on equal footing with the government's need to confiscate contaminated food or misbranded drugs.[7] The government's interest in attacking the illicit drug industry for the good of the public welfare outweighs any individual's interest in real property associated with the illegal drug industry.

The states' interest in protecting the health and safety of its citizens is advanced by not requiring the government to delay its seizure of real property associated with the drug industry until after notice and an adversarial hearing can be provided. Real property associated with the illegal drug industry poses a significant threat to the public. Real property associated with the drug industry, such as crack houses, attract drug users who are likely to commit criminal acts. Drugs "relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture. See, Goldstein, Drugs and Violent Crime, in Pathways to Criminal Violence 16, 24-36 (N. Weiner, M. Wolfgang eds., 1989)." *Harmelin v. Michigan*, 111 S.Ct. 2680, 2760 (1991) (O'Connor, J., concurring). The illegal drug trade harms not only the individual user of drugs but also creates a very real threat to the public welfare given the "direct nexus between illegal drugs and crimes of violence." *Id.* The holding of the court below - that seizure must be delayed until notice and an adversarial hearing is provided - frustrates the governmental interest in protecting the welfare and safety

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[7]Procedural due process is not denied when the postponement of notice and a hearing is necessary to protect the public from misbranded drugs, *Ewing v. Mytinger & Casselberry Inc.* 339 U.S. 594 (1950), from contaminated food, *North America Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908), from a bank failure, *Coffin Bros. & Co. v. Bennett*, 227 U.S. 29 (1928), or to aid the collection of taxes. *Phillips v. Commissioner*, 283 U.S. 589 (1931).

of its citizenry by seizing real property associated with the illicit drug industry.

The use of the forfeiture laws also encourages lessors of real property to exercise greater care when transferring possession of the real property. *Calero - Toledo*, 416 U.S. at 687-688. The possibility of the forfeiture of the real property has the desirable effect of inducing property owners to exercise greater care when transferring possession of the property so that the property does not become, for example, a crack house. Similarly, the possibility of forfeiture serves to discourage property owners who would abandon their real property.

The giving of preseizure notice and a hearing would also frustrate the interests served by the drug forfeiture statutes. Admittedly, real property can not be removed or concealed. Real property is, nevertheless, "often ... of a sort that could be ... destroyed ... if advance warning of confiscation were given." *Calero - Toledo*, 416 U.S. at 679. A drug trafficker who is first informed of the government's intention to take his real property could certainly decide to destroy or damage that property rather than relinquish his property to the government to help finance law-enforcement activities. A notice of lis pendens filed at the local courthouse is hardly an effective deterrent sufficient to protect the government's interest in the real property against a gallon of gasoline and a book of matches in the hands of a disgruntled drug trafficker who would rather see the property go up in flames rather than be used to help fund anti-drug efforts.

There is still another compelling state interest against requiring preseizure notice and hearing for real property assets. As the Court has previously observed, those involved in the illicit drug industry "do not hesitate to use violence to protect their lucrative trade and avoid apprehension." *Treasury Employees v. Von Raab*, 489 U.S. 656, 669 (1989). The threat of violence against law enforcement officers in their efforts against the illicit drug industry is a very real one which can mean the difference

between life and death for those officers. While Good dismisses such concern as "farfetched," (Respondent's Brief in Opposition, p.9), the incredibly violent nature of the drug business calls for a recognition of the need for law enforcement officers to move quickly and without prior announcement. The decision to seize an urban crack house or a rural drug lab without prior notice is just the sort of decision that is best left to the discretion of law enforcement officers who are in the best position to size up the threat posed to them.

Law enforcement officials move quickly and without prior notice when they enter houses and real property associated with the illegal drug trade for the obvious reason that they seek to minimize the threat of physical harm or death to themselves or others. Indeed, "... courts have recognized the high level of violence associated with the drug distribution business...." *United States v. Martinez*, 938 F.2d 1078, 1083 (10th Cir. 1991). As the Second Circuit has observed, "[e]xperience ... has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade ...." *United States v. Wiener*, 534 F.2d 15, 18 (2nd Cir. 1976). The threat posed by those associated with the illegal drug industry to law enforcement officers in this country - whether those individuals are users or dealers of drugs - is not idle speculation. In the ten year period from 1980 through 1989 22% of the persons who killed a law enforcement officer in this country had at least one prior arrest on a drug law violation.[8] The threat of physical injury or death to law enforcement officials is a very real one. Notice and an adversarial hearing should be required as a matter of fundamental due process only *after* the real property is seized and secured given the inherently violent nature of the illegal drug industry.

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[8]United States Department of Justice, *Sourcebook of Criminal Justice Statistics, 1990*, at 397.

Finally, turning to the third consideration of *Calero-Toledo*, such seizures are ones initiated by government officials and not self-interested private parties. Accordingly, this case does not present a situation where there has been an abdication of government power. *See*, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). The seizure, by the government, of real property associated with the illicit drug industry hardly presents a situation like that where "[p]rivate parties, serving their own private advantage, may unilaterally invoke state power ...." *Fuentes v. Shevin*, 407 U.S. at 93.

Given the compelling governmental interests at stake when the government seeks to seize real property subject to forfeiture for violation of drug laws, fundamental due process should not require the seizure to be delayed until after notice and an adversarial hearing is provided. The Ninth Circuit erred when it held otherwise.

B. The Initial Seizure Of The Real Property Assets Of The Illicit Drug Industry Is Limited Only By The Requirements Of The Fourth Amendment.

The Ninth Circuit distinguished this case from this Court's holding in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) on the ground that *Calero-Toledo* involved a yacht and not real property. That distinction simply does not support the Ninth Circuit's holding that Good was entitled, as a matter of fundamental due process, to notice and an adversarial hearing *before* the government could seize his real property subject to forfeiture for violation of the drug laws. The Ninth Circuit relied on the second *Calero - Toledo* factor to reach its holding on the basis that the second factor is inapplicable to real property, which cannot be moved. However, the second factor in *Calero - Toledo* only pointed out the property will "often" be such that it could be removed, destroyed, or concealed. The Ninth

Circuit also failed to give adequate consideration to the governmental interests at stake.

Given the compelling governmental interests at stake when real property subject to forfeiture is seized, preseizure notice and an adversarial hearing was not required as a matter of fundamental due process. Without question, the Court has recognized the privacy interests of citizens to be free from governmental intrusion in their homes absent a warrant. *Payton v. New York*, 445 U.S. 573, 590 (1980), *United States v. Karo*, 468 U.S. 705, 714 (1984). The initial seizure of Good's real property took place within the confines of the Fourth Amendment since it was done pursuant to a warrant supported by a finding of probable cause by a neutral and detached magistrate. The holding of the Ninth Circuit that something more was required prior to the seizure as a matter of fundamental due process, beyond that required by the Fourth Amendment, was error.[9]

In this case, respondent's real property was initially seized by federal authorities pursuant to a warrant issued by a United States Magistrate Judge of the United States District Court for the District of Hawaii. The warrant was based upon a sworn affidavit of a federal agent setting forth the drugs and drug paraphernalia uncovered by state law enforcement officers in their earlier search of Good's property and on Good's plea of guilty in state court. The initial seizure of Good's real property, the states believe, easily passes constitutional muster since

[9]The application of the Fourth Amendment to seizures for forfeiture is analogous to its application to seizures in furtherance of the tax laws. *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977). As the Court observed, the seizure of property without a warrant not involving "any invasion of privacy" did not violate the Fourth Amendment. *G.M. Leasing*, 429 U.S. at 351-352. Where, however, the intrusion is upon a protected privacy interest, a warrant is required unless the case falls within one of the exceptions to the warrant requirement. *G.M. Leasing*, 429 U.S. at 352-353.

it was based upon a determination of probable cause to believe that Good had used his real property for illicit drug activities.

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The proscription of the Fourth Amendment against *unreasonable* searches and seizures "is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, ..." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Since the warrant in this case authorizing the seizure was based upon a finding of probable cause, the requirement of the Fourth Amendment that seizures by the government be *reasonable* was satisfied.[10] The seizure warrant obtained by the government in this case served the policy behind the Fourth Amendment since it provided "the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States v. Chadwick*, 433 U.S. 1, 9 (1977).[11]

[10]The warrant is prima facie proof that the law enforcement officers acted reasonably in conducting the search or seizure since "[o]nce the warrant issues, there is literally nothing more that the policeman can do in seeking to comply with the law." *Stone v. Powell*, 428 U.S. 465, 498 (1976) (Burger, C.J., concurring).

[11]The Ninth Circuit failed to give any weight, in its analysis, to the procedural safeguard of a seizure warrant issued by a neutral and detached magistrate. The seizure warrant procedure is a mechanism by which the government's need to act is reviewed by a neutral and detached magistrate who can fashion the limits of the seizure warrant to those reasonably necessary to accomplish the seizure of the property subject to forfeiture.

The Court's decision in *United States v. Monsanto*, 491 U.S. 600 (1989) supports the conclusion that the showing of probable cause was sufficient to support the initial seizure in this case. In *Monsanto* the Court upheld a pretrial order in a federal criminal case barring the defendant from transferring property (including real property in the form of a home and apartment) prior to trial. The Court acknowledged that "[w]e have previously permitted the Government to seize property based on a finding of probable cause to believe that the property will ultimately be proved forfeitable." *Monsanto*, 491 U.S. at 615. Relying on the decisions in *United States v. $8,850*, 461 U.S. 555 (1983) and *Calero - Toledo v. Pearson Yacht Leasing Co., supra*, the Court held that "assets in a defendant's possession may be restrained in the way they were here based on a finding of probable cause to believe that the assets are forfeitable." *Id.*

Indeed, the Court went on to observe that "it would be odd to conclude that the Government may not restrain property, such as the house or apartment in respondent's possession, based on a finding of probable cause, when we have held that (under appropriate circumstances), the Government may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense." *Monsanto*, 491 U.S. at 615-616 (Citing *United States v. Salerno*, 481 U.S. 739 (1987)). The Court went on to recognize that a restraint of the property, based upon a showing of probable cause, would serve to "protect the community's interest in full recovery of any ill-gotten gains." *Monsanto*, 419 U.S. at 616.

The same rationale is just as applicable in this case. There existed in Good's case evidence well beyond the probable cause standard that he had used his home to carry out his illicit drug activities. Surely, as the Court pointed out in *Monsanto*, if the government may seize Good's person upon a showing of probable cause to believe he has committed a criminal drug offense, the government may also seize Good's real property upon a

showing of probable cause to believe that the real property was associated with drug trafficking. Such seizures further the states' interest in securing for forfeiture the real property assets of the illicit drug industry. As in *Monsanto*, such seizures "protect the community's interest in full recovery of any ill-gotten gains." *Monsanto*, 419 U.S. at 616. Once the public's interest in the property is secured by the initial seizure, the government may then elect to permit any tenants to remain on the property with rents to be paid to the government as was done in this case, or enter into a "residency agreement" which restricts the owner's ability to alienate the house, makes the owner liable for any damage, and permits the government to inspect the property. *Application of Kingsley*, 802 F.2d 571, 579 (1st Cir. 1986).

Good received that to which he was entitled when his real property subject to forfeiture was initially seized - a determination of probable cause "decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, ..." *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975). This Court should reject the effort to impose additional limits, beyond those imposed by the Fourth Amendment, upon the initial seizure of real property subject to forfeiture by way of the Due Process Clause in light of the important governmental interests at stake.

II. THE FORFEITURE OF THE REAL PROPERTY ASSETS OF THE ILLICIT DRUG INDUSTRY SERVES THE STATES' COMPELLING INTEREST OF FIGHTING ILLEGAL DRUG TRAFFICKING.

A. The Forfeiture Of The Real Property Assets Of The Illicit Drug Industry Serves A Compelling Interest.

The forfeiture of the real property assets of the illicit drug industry in this country serves the states' compelling

interest in protecting the public from the ravages of the drug trade.[12] That drug traffickers and drug users cause inestimable damage to our nation is beyond cavil. There are, literally, millions of drug abusers in this country.[13]

The direct costs of illicit drug use are enormous and such costs fall heavily on the states. The direct costs of medical treatment for children whose mothers used cocaine during pregnancy are but one small example of the direct costs of illicit drug use in this country. 72 public and private hospitals in some 12 cities are caring for more the 7,000 "boarder babies" a year at a cost of $34 million a year.[14] Illicit drug use has also helped to spread the AIDS epidemic through this country's population. In New York City, public health officials estimate that 61 per cent of New York City's female AIDS cases and 37 percent of the male cases stem from using infected needles. At present, the lifetime cost of providing treatment for a single AIDS patient in this country is in excess of $100,000.[15]

The direct costs of illegal drug use are but a part of the entire toll the illicit drug industry exacts upon the public. Every part of this country suffers from the use of drugs and the related crime it spawns. Drug trafficking and drug use disintegrates entire communities and spawns a cycle of violence, weakened economies,

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[12]In 1990, 48% of all Americans polled considered drug use in their neighborhoods to be "very serious" or "somewhat serious." United States Department of Justice, *Sourcebook of Criminal Justice Statistics, 1991*, at 240.

[13]United States Department of Justice, *Drug Trafficking: A Report to the President of the United States*, p.2 (August 3, 1989).

[14]New York Times, July 26, 1992, at A16.

[15]New York Times, July 23, 1992, at B8.

suburban flight, joblessness and fear.[16] The illicit drug industry has helped create a pervasive culture of violence and despair in which the only measure of human achievement is material success through drug peddling.

Federal and state forfeiture laws are one important way the public can strike back, through their government, at the illicit drug industry. Nearly ten years ago, Congress recognized that the forfeiture of the real property assets of the illicit drug industry could be a powerful tool in the effort to stem the flow of illegal drugs in this country. Congress amended the federal civil forfeiture statute to expressly permit the forfeiture of the illicit drug industry's real property assets. Congress recognized that "the traditional sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence is plaguing the country.[17]" Congress also recognized that if efforts to combat the illegal drug trade are to be successful, "they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made."[18] Congress made it clear that it intended the forfeiture of real property to serve as a "powerful deterrent" to the illicit drug industry:[19]

> The extent of drug-related property subject to civil forfeiture under 21 U.S.C. 881 is also too limited in one respect. Under current law, if a person uses a boat or car to

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[16]National Crime Prevention Council, *Creating a Climate of Hope: Ten Neighborhoods Tackle the Drug Crisis*, p.1 (1992).

[17]S. Rep. No. 225, 98th Cong., 2d Sess. 191, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3374.

[18]*Id.*

[19]*Id.* at 3378.

> transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marijuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, even though its use was indispensable to the commission of a major drug offense and the prospect of the forfeiture of the property would have been a powerful deterrent.

Congress was absolutely correct when it perceived that real property forfeiture can be a "powerful deterrent" to the illicit drug industry in this country. This powerful tool - real property forfeiture - serves the states' compelling interest in combatting the pernicious effects of illegal drugs on its victims and on society. The forfeiture of real property used in the illicit drug industry works on several levels to attack illegal drug trafficking.

The states have a pecuniary interest in such forfeitures since the forfeited property may be used by the government to finance anti-drug law enforcement efforts "and the Government's interest in using the profits of crime to fund these activities should not be discounted." *Caplin & Drysdale v. United States*, 491 US 617, 629 (1989). *See also, One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972). In recognition of the important role state and local law enforcement officers play in the anti-drug effort, Congress has provided that property forfeited pursuant to the federal statute may be transferred "to any state or local law enforcement agency which participated in the seizure or forfeiture of the property; ...." 21 U.S.C. 881(e)(1).[20]

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[20]The statute incorporates the procedural provisions of the federal customs forfeiture laws set out in 19 U.S.C. § 1602 - 1619 "insofar as applicable and not inconsistent with the provisions" of § 881. *See*, 21 U.S.C. § 881(d). Additionally, 19 U.S.C. § 1616a provides that the forfeited property may be transferred to any participating local law enforcement agency.

The forfeiture of the real property assets of the illicit drug industry is an important tool which furthers a compelling governmental interest. That governmental interest is, of course, the need to protect its citizenry from the ravages of illegal drugs. That interest is advanced by attacking the assets of the illicit drug industry through the forfeiture laws. As the Court has previously observed, forfeiture of property used in violation of the drug laws fosters the purposes served by the underlying criminal statutes by preventing further illicit use of the property and by imposing an economic penalty rendering the illegal behavior unprofitable. *Calero - Toledo v. Pearson Yacht Co.*, 416 U.S. 663, 687 (1974). If our efforts to fight drug trafficking are to have any chance of success, an attack on the economic bases of the drug industry must be made. Forfeiture is the way by which the states may make such an attack.

B. The Forfeiture Of Property Associated With Criminal Activity Is A Principle Well Established In The Jurisprudence Of This Country.

Both federal and state officials have increasingly used civil forfeitures as part of their efforts against the illicit drug industry.[21] The forfeiture of property used in criminal activities, including real property used for criminal endeavors, is a principle well established in the law of this country, and is deeply rooted in tradition.

The notion of forfeiture of property originated in Biblical times through the religious atonement practice of

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[21]New York Times, October 14, 1986, at B1.

deodand.[22] The ancient Greek[23] and Roman[24] societies similarly adopted the concept of the deodand as compensation for injured persons. The early notions of forfeiture were based on the belief that property causing injury or death became tainted with evil requiring expulsion of the property in order to protect society.[25] However, over time the concept of deodand lost its religious meaning and came to be used as a way to generate revenue for the sovereign.[26] The English common law theory was that property which caused injury

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[22]"[I]f an ox gore a man or a woman, and they die, he shall be stoned and his flesh shall not be eaten." Exodus 21:28. The term deodand comes from the Latin phrase *deo dandum*, which means a thing to be given to God. Black's Law Dictionary 392 (5th ed. 1979). The Biblical rule in effect commanded that the ox be forfeited to God.

[23]O.W. HOLMES, THE COMMON LAW 7-8 (1881). Ancient Greek law contained many provisions concerning the forfeiture of objects associated with wrongdoing. *Id*. If an animal or an inanimate object caused death it was to be cast beyond the borders. *Id*. at 8. Two centuries after Christ, Pausaias observed that "they still sat in judgment on inanimate things in the Prytaneum." *Id*.

[24]1 S. SCOTT, THE CIVIL LAW 69 (1932). Provisions for forfeiture under ancient Roman law may be found as far back as 451 B.C. *Id*. "[I]f a quadruped causes injury to anyone, let the owner ... surrender the animal that caused the injury." *Id*.

[25]1 W. BLACKSTONE, COMMENTARIES 299-300 (1897).

[26]O.W. HOLMES, *supra* note 2, at 15-24. In early English common law, if an object accidentally caused the death of one of the King's subjects, it was forfeited to the Crown and was used to pay for Masses said on behalf of the deceased subject. Finklestein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 Temp. L.Q. 169, 180-181 (1973). This religious remedial purpose was, however, ultimately discarded and the practice became simply a way to generate revenue for the state. *Id*.

committed a breach of the King's peace and was, accordingly, subject to forfeiture to the sovereign.[27]

In this country, the forfeiture of property associated with criminal activity has been long recognized.[28] While the early American courts declined to recognize the deodand concept of forfeiture, "[l]ong before the adoption of the Constitution the common law courts in the Colonies - and later in the states during the period of Confederation - were exercising jurisdiction in rem in the enforcement of [English and local] forfeiture statutes." *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 139 (1942). These early colonial statutes provided for the forfeiture of commodities and vessels used in violation of the customs and revenue laws. *C.J. Hendry*, 318 U.S. at 148. After the American Revolution, some of the earliest legislation by Congress included forfeiture provisions.[29]

Since the enactment of the earliest forfeiture statutes, civil forfeiture proceedings have been regarded as against the property, or *in rem*. *Jennings v. Carson*, 8 U.S. (4 Cranch) 2, 23-24 (1807). In *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827), a Spanish ship was seized under claims of piracy in violation of federal law. *The Palmyra*, 25 U.S. at 8. While the acquittal of the piracy claim was upheld, the Court explained that the civil

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[27]1 W. BLACKSTONE, *supra* note 4, at 299. The convicted felon, under English Common Law forfeited his chattels to the Crown and his real property escheated to his lord; the convicted traitor forfeited all of his real and personal property to the Crown. 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 68-71 (2d ed. 1927); 1 F. POLLACK & F. MAITLAND, HISTORY OF ENGLISH LAW 351 (2d ed. 1909).

[28]Deodands did not become part of the common-law tradition of the United States. *Parker-Harris Co. v. Tate*, 135 Tenn. 509, 188 S.W. 54 (1916).

[29]Act of Aug. 4, 1790, §§ 13, 22, 27, 28, 67, 74, 1. Stat. 157, 161, 163, 176, 179.

forfeiture proceeding was against the property itself. *The Palmyra*, 25 U.S. at 14-15. As the Court explained, "[t]he thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be malum phohibitum, or malum in se ... the practice has been, and so this Court understands the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in person." *Id*. As the Court has observed concerning the rationale behind civil forfeiture, whether it is "artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." *J.W. Goldsmith, Jr. - Grant Co. v. United States*, 25 U.S. 505, 511 (1921).

The forfeiture of real property used in criminal activity through civil forfeiture proceedings was considered by the Court well over a century ago in *Dobbin's Distillery v. United States*, 96 U.S. 395 (1878). In that case, a landlord's personal and real property was seized and ultimately forfeited to the United States due to the tenant's operation of an illegal distillery on the leased premises. The forfeiture of the landlord's personal and real property was upheld by the Court since the proceeding was a civil in rem action under which Congress attached the offense to the distillery. Justice Clifford, writing for the Court, observed that "the act of Congress in question attaches the offense to the distillery, and the real and personal property connected with the same, ..." and that violation of the statute required that "the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property used in the business, shall be forfeited to the United States. 15 Stat. 133." *Dobbins Distillery*, 96 U.S. at 400-401.

Congress recognized well over a hundred years ago, when it authorized the forfeiture of the real property of illegal distilling operations, that the seizure and forfeiture of real property used in such activities could prevent further illegal use and impose an economic penalty for such illegal use. Similarly, the legislative

decision to authorize the seizure and forfeiture of the real property assets of the illicit drug industry in this century reflects a recognition that such forfeitures will help prevent the further use of such real property in the illicit drug industry and impose an economic sanction on that illegal industry. Seizure and forfeiture of the real property assets of the illicit drug industry is based upon a principle of law well established in the jurisprudence of this country.

CONCLUSION

For the reasons stated above, the states respectfully request this Court to hold that the Due Process Clause of the Fifth Amendment does not require notice and hearing *prior* to the seizure of real property subject to forfeiture for violation of drug laws. The forfeiture of the real property assets of the illicit drug industry furthers the compelling interest of fighting illegal drug trafficking; the Ninth Circuit's unwarranted interpretation of the Due Process Clause in this case will only serve to frustrate that compelling government interest.

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On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Institute for Justice is a non-profit, public interest law center committed to defending and strengthening three essential components of a free society: private property rights, economic liberty, and the free exchange of ideas.

Recently, civil forfeiture laws have been used aggressively at both the federal and state level. These laws grant governments vast authority and discretion to deprive individuals of private property. While recognizing the

important governmental interest in curbing violence and crime, it is imperative that the use of civil forfeiture laws comport with due process and the constitutional rights of private property owners.

Toward that end, the Institute files this brief in support of the respondent faced with the seizure and forfeiture of his home. The question directly before the Court and addressed in this brief is whether the government must comply with minimal due process guarantees under the Fifth Amendment by affording notice and an opportunity to be heard before depriving someone of his home.[1]

The Institute for Justice has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

This case arises out of the seizure and attempted forfeiture of James Daniel Good's home and other real property by law enforcement agencies of the United States and the State of Hawaii. In January 1985, state officials searched the real property of Mr. Good and discovered 89 pounds of marijuana along with drug paraphernalia. In June and July 1985, Good was charged and

[1] This brief does not address the second question presented in this case: whether the forfeiture of real property is untimely and thus barred under 21 U.S.C. § 881(a)(7) due to the four-and-a-half-year delay between the search of the home and filing of a forfeiture action.

pleaded guilty to "promoting a harmful drug" under state law. He was sentenced to one year in jail. By August 1989, he had served his sentence and was performing satisfactorily on all terms of his probation.

However, on August 8, 1989, over four-and-a-half years after the initial search, the United States filed a forfeiture action against Good's property. At the time of the seizure of the property, it was being temporarily leased by Good to tenants. The government allowed the tenants to remain, but all subsequent rent payments were made to the government.

The United States did not provide notice or an opportunity for a hearing to anyone with an interest in the property before seizing it. Since the seizure and filing of the forfeiture action, the government has never offered any explanation for its delay in seizing the property and has refused all requests for discovery.

The district court upheld the forfeiture, but the United States Court of Appeals for the Ninth Circuit reversed and remanded, holding that federal civil forfeiture statutes require the government to act "promptly" and that the current record was inadequate to determine if the government had done so in this case. The Ninth Circuit also held that the Due Process Clause of the Fifth Amendment requires the government to give property owners notice and an opportunity for a hearing before seizing a home, unless emergency circumstances exist.

SUMMARY OF ARGUMENT

Civil forfeiture is one of the most powerful weapons in the government's anti-crime arsenal. To seize and forfeit private property, the government need only show probable cause that the property was involved in illegal activity. It does not matter whether the owner of the property is ever charged with a crime or even involved in any wrongdoing. Once probable cause is shown that the property was involved in a criminal act, the burden of proof shifts to the owner to demonstrate that the property was not involved in illegal activity.

In light of the vast powers granted to the federal government under civil forfeiture statutes, courts should insure that the application of these laws does not violate constitutional rights. When the federal government deprives an individual of life, liberty, or property, the Fifth Amendment requires, at minimum, notice and a hearing for the affected individuals. Nineteen years ago, this Court carved out an exception to due process for the seizure and forfeiture of a yacht in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Notice and hearing were not required in that instance because of (1) important governmental interests in immediate seizure; (2) the fact that yachts and other personal property could be easily concealed or moved; and (3) the forfeiture was initiated by non-self-interested "public" officials.

We urge this Court to reconsider or limit the exception to due process requirements created in *Calero-Toledo*. The factual premises in *Calero-Toledo* relate to personal but not real property, and hence should not extend to the

circumstances of other cases like this one. More significantly, *Calero-Toledo*'s presumption that the forfeiture power is wielded by non-self-interested public officials is simply false, and therefore provides an inadequate basis on which to deprive individuals of precious due process rights.

Furthermore, the right to private property in general, and the right to peaceful enjoyment of one's home in particular, are deeply rooted in our heritage and explicitly protected by several provisions of the Constitution. In routine seizures and forfeitures of real property, the government has not demonstrated an "extraordinary" circumstance needed to bypass essential due process guarantees. Also, the government's assertion that adequate protections for property owners are found in Fourth Amendment guarantees and Justice Department policy are also unpersuasive in the context of real property forfeiture. Only the Fifth Amendment's requirement of notice and hearing will provide firm protection against arbitrary and mistaken seizures of real property.

ARGUMENT

The Fifth Amendment to the United States Constitution guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . . " It serves equally as an affirmative restraint on the legislative, executive, and judicial powers of government. *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855). Historically, the Amendment "embodies the Lockean belief that liberty and the right to

possess property are an interwoven whole; neither life, liberty, or property can be arbitrarily denied us by government." *United States v. $12,390.00*, 956 F.2d 801, 810 (8th Cir. 1992) (Beam, J., dissenting); *see also* L. Levy, *Original Intent and the Framers' Constitution* 276-77 (1988).

Before the government deprives an individual of property, the Due Process Clause requires, barring an "extraordinary" situation, "that there shall be notice and opportunity for hearing between the parties." *Twining v. New Jersey*, 211 U.S. 78, 110 (1908); *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner"). However, since amendment of the civil forfeiture statutes in 1984, the United States can currently deprive individuals of homes and other real property without giving notice or a hearing to the affected property owners. *See* 21 U.S.C. § 881(a)(7); *but see United States v. Property at 4492 South Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989) and *United States v. A Parcel of Land, Bldgs., Appurtances, and Improvements Known as 92 Buena Vista Ave.*, 937 F.2d 98 (3d Cir. 1991) (*aff'd on other grounds*, 113 S.Ct. 1126 (1993)) (due process requires notice and hearing before seizure of real property); *see also Richmond Tenants Org. v. Kemp*, 956 F.2d 1300 (4th Cir. 1992) (due process requires notice and hearing before eviction of public housing tenants, unless emergency circumstances exist).

In the instant case, the government premises its argument against complying with the normal requirements of due process on this Court's decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). In *Calero-Toledo*, an exception to the Due Process Clause was carved

out for the seizure of a yacht for forfeiture because (1) the seizure served significant governmental interests; (2) preseizure notice and a hearing could frustrate those interests by allowing an owner to conceal or destroy property if advance warning were given; and (3) unlike in *Fuentes v. Shevin*, 407 U.S. 67 (1972), the seizure was initiated not by self-interested private parties, but by government officials. *Calero-Toledo* at 679. Therefore, the seizure and forfeiture presented an "extraordinary" situation "in which postponement of notice and hearing . . . did not deny due process." *Id.* at 680.

I. THE NOTION THAT GOVERNMENT ACTIONS ARE CARRIED OUT BY NON-SELF-INTERESTED PUBLIC OFFICIALS IS FALSE ESPECIALLY IN CIVIL FORFEITURE WHERE GOVERNMENT OFFICIALS AND THEIR AGENCIES HAVE A DIRECT FINANCIAL STAKE IN SUCCESSFUL FORFEITURES

A deep distrust of consolidated government power and an abiding determination to protect individual rights from government overreaching animates our Constitution. Nevertheless, this Court's reasoning in *Calero-Toledo* was grounded in skepticism toward the private sphere of conduct, rather than government action. A justification for the "extraordinary" situation described in *Calero-Toledo* was that the seizure was initiated not by "self-interested private parties, but by government officials." *Id.* at 679. Conversely, just two years before *Calero-Toledo*, this Court held that a private party, before repossessing goods sold under a conditional sales contract, must give notice and the opportunity for a hearing to a debtor who

defaults on payments. *Fuentes v. Shevin*, 407 U.S. 67 (1972). Hence the anomaly that despite the Fifth Amendment's applicability to government action, under current precedent, an individual facing repossession of property by the rightful private owner of that property is accorded greater due process protection than an individual whose property is seized through forfeiture by the government.

Perhaps no other law casts greater doubt on the *Calero-Toledo* premise that government officials do not act in their own self-interest than federal civil forfeiture law. Indeed, individuals operating in the public sphere are very similar to the "self-interested" private parties described by this Court in *Fuentes*; whether in the public or private sectors, individuals tend to promote their self-interest in any given instance. *See* J. Buchanan & G. Tullock, *The Calculus of Consent* (1962) (seminal treatment of the implications of the self-interest axiom for public policy decision-making). A key distinction, however, is that in the private, voluntary sphere, self-interested transactions usually generate mutually beneficial outcomes since they are consensual. Conversely, the coercive nature of government action requires constraints to be placed on self-interest through clearly defined and strictly enforced constitutional rules. The Framers of the Constitution recognized this natural proclivity and the need for institutional restraints on government action:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. . . . A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The Federalist No. 51 (James Madison).

Because governments no less than individuals are self-interested, the challenge faced by the Framers was "constructing and designing framework institutions [and] rules that will, to the maximum extent possible, limit the exercise of such interest in exploitative ways and direct such interest to furtherance of the general interest." Buchanan, "The Public Choice Perspective," in *Economia delle scelte pubbliche 1*, January 1983, 14; *see also* J. Buchanan & G. Tullock, *The Calculus of Consent* 24-5. The Due Process Clause of the Fifth Amendment is one of the several "auxiliary precautions" designed by the Framers to protect individuals from unwarranted government actions.

Constitutional restraints on the exercise of power are particularly needed when government agencies are granted authority to deprive individuals of private property. Today, agencies and bureaucracies operate independently from normal democratic control and accountability. *See* W. Niskanen, *Bureaucracy and Representative Government* (1971); C. Bolick, *Grassroots Tyranny: The Limits of Federalism* (1993). While many individuals within a government organization may share a principled commitment to carrying out the mission of the agency, government officials, operating in what they perceive as their own rational self-interest, will also attempt to maximize the size and budget of their agency. Larger budgets will

benefit everyone within an agency through higher salaries, greater job security, better equipment, and increased power and prestige.

The incentive to maximize an agency's budget through improper action is particularly strong in the context of civil forfeiture. Such incentives can affect even the most well-intentioned law enforcement officers. The present substance and application of civil forfeiture laws differ significantly from the laws scrutinized by this Court at the time of *Calero-Toledo*. In 1974, civil forfeiture was a rarely invoked power. In 1984, the United States Congress passed the Comprehensive Forfeiture Act, vastly expanding both the powers of government to seize and forfeit private property while also adding forfeiture provisions to numerous federal criminal statutes.[2]

Perhaps most significantly for due process analysis, Congress also established the Assets Forfeiture Fund, administered by the U.S. Department of Justice, and charged with collecting and distributing proceeds from successful forfeitures. 28 U.S.C. § 524(c)(1). Previously, all proceeds from forfeitures exceeding $5 million were transferred to the general fund of the Treasury. *See* Fried, *Rationalizing Criminal Forfeiture*, 79 J. Crim. L. & Criminology 328, 364 (1988). The 1984 amendments eliminated the ceiling and allowed unlimited proceeds to be placed in

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[2] *See, e.g.*, 16 U.S.C. §§ 65, 117d, 128, 171 (guns and other property used unlawfully in national parks); 18 U.S.C. § 1082 (property used in illegal gambling); 18 U.S.C. § 3667 (property used in liquor law violations); 21 U.S.C. § 881 (property, including real property, used in drug offenses).

the Fund for use by law enforcement agencies. 28 U.S.C. § 524(c)(4).

The 1984 amendments also revolutionized civil forfeiture by allowing federal Assets Forfeiture Fund proceeds to be shared with state and local law enforcement agencies. *See* 21 U.S.C. § 853(i)(4) (allowing payment of forfeiture proceeds to "any State or local . . . agency which participated directly in the seizure or forfeiture . . . "). After law enforcement agencies were granted a direct financial incentive to initiate and prosecute forfeiture actions, the use of the new statute and revenues generated by civil forfeiture skyrocketed. Proceeds from civil forfeiture increased from $27 million in 1985 to $644 million in 1991, *an increase of over 1500 percent*. *See* U.S. Dep't of Justice, *Federal Forfeiture of the Instruments and Proceeds of Crime: The Program in a Nutshell* 1 (1990). From 1984 to 1990, the U.S. government has forfeited property worth approximately $1.5 billion. *Foreword* to U.S. Dep't of Justice, *1990 Annual Report of the Department of Justice Asset Forfeiture Program*. The property and proceeds from forfeiture are retained and used for "law enforcement" purposes by the "seizing agencies." *See* 21 U.S.C. § 853(i)(4). This form of "revenue enhancement" for the federal government is independent of normal appropriation and budget processes. *See* 28 U.S.C. § 524(c)(1).

Of course, it is the prerogative of the federal government to increase the role of civil forfeiture in curtailing criminal activity. Nevertheless, courts have the corresponding obligation to ensure that these laws and their application do not violate constitutional guarantees.

When public officials and their agencies have a direct financial stake in the outcome of their actions, as in the case of civil forfeiture, this Court has subjected such actions to particularly close scrutiny. *See Tumey v. Ohio*, 273 U.S. 510 (1927) (overturning fine where mayor, who also sat as a judge, personally received a share of the fines); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (due process violated where substantial portion of town's income came from fines imposed by town mayor sitting as judge). In *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980), while upholding civil penalty provisions under the Fair Labor Standards Act, this Court declared that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." Such serious questions are raised, in part, when a government official's "judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts." *Id.* at 250.[3]

The potential for improper motives is especially great when state and local law enforcement agencies engage in "adoption." Federal officials can take over or "adopt" a forfeiture prosecution developed by local police and

[3] In reviewing the substance of legislation and government decision-making, this Court has held that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate when the State's self-interest is at stake." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26 (1977); *see also Harmelin v. Michigan*, 111 S.Ct. 2680, 2693 (1991) ("it makes sense to scrutinize government action more closely when the State stands to benefit").

prosecutors. Through adoption, state and local law enforcement can bypass state laws and procedures that may make it more difficult to seize property or to funnel forfeited proceeds to law enforcement agencies.[4]

Although it is not clear from the record, "adoption" seems to have taken place in the instant case. Hawaii authorities conducted the original search of the property and arrested and convicted respondent under state law. Brief for the United States at 2. Then, over four-and-a-half years later, the United States filed a forfeiture action against respondent's real property.[5]

[4] For example, many states require forfeiture proceeds to be placed in either general revenue accounts or devoted to drug rehabilitation programs. In contrast, federal forfeiture law "allocates up to ninety percent of the proceeds from drug-related forfeitures to be returned to local law enforcement agencies." Note, *Scorched Earth: How the Expansion of Civil Forfeiture Has Laid Waste to Due Process*, 45 U. Miami L. Rev. 911, 975 (1991); *see, e.g.*, 21 U.S.C. § 881(e)(1)(A).

Furthermore, many states place greater procedural limitations on the ability to seize and forfeit private property than federal statutes. For example, under Kentucky law, real property can be seized "only pursuant to final judgment and order of forfeiture or upon order of the court having jurisdiction over the property. . . . " Ky. Rev. Stat. § 218A.415. Ironically, the Attorney General of Kentucky filed an *amicus* brief in the instant case on behalf of 18 state attorneys general, advocating the summary seizure of real property without notice and a hearing if done by federal officials.

[5] The practice of reviewing old arrest records for forfeiture opportunities is seemingly common in the U.S. Attorney's Office in Hawaii. A recent news article recounts the attempted

The practice of adoption, in addition to normal sharing of forfeiture revenues with state and local law enforcement agencies, has prompted one federal appeals court judge to wonder whether "we are seeing fair and effective law enforcement or an insatiable appetite for a source for increased agency revenue." *United States v. $12,390.00*, 956 F.2d at 807.[6]

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forfeiture of the home of Joseph and Frances Lopes whose son was arrested and plead guilty to marijuana cultivation:

> Back when Thomas was arrested, police rarely took homes. But since then agencies have learned how to use the law and have seen the financial payoff, says Assistant U.S. Attorney Marshall Silverberg of Honolulu.
>
> They also carefully review old cases for overlooked forfeiture possibilities, he says. The detective who uncovered the Lopes case started a forfeiture action in February – just under the five year deadline for staking such a claim.

"Police profit by seizing homes of innocent," reprinted in *Presumed Guilty: The Law's Victims in the War on Drugs*, The Pittsburgh Press, August 11-16, 1991.

[6] In a recent *per curiam* decision, the Fifth Circuit scathingly indicted the practice of "adoption." The case arose out of the seizure of currency by a local sheriff's department in Louisiana. The money seized by local authorities was handed over to the federal Drug Enforcement Administration (DEA) for civil forfeiture the same day the state court ordered the currency seized and held for evidence as required under state law. In response to this bypass of state procedure, the appeals court declared that

> each member of the court was deeply disturbed by the actions of the federal and state agents in appropriating Scarabin's money – candidly acknowledged by counsel for DEA – actions that would have constituted illicit money laundering if perpetrated by private parties. We were even more distressed by the revelation that these activities were not merely condoned but were actively advocated and supported by officials of the DEA in positions to make and implement policy.

Scarabin v. Drug Enforcement Administration, 966 F.2d 989, 994 (5th Cir. 1992).

Coupled with agency enrichment in civil forfeiture proceedings, government officials often stand to personally benefit from seizures of property. A report by the General Accounting Office documented some of the personal uses to which forfeited assets have been put by law enforcement officials. *Internal Controls – Drug Enforcement Administration's Use of Forfeited Personal Property*, GAO (Dec. 10, 1986).[7] Although proceeds and assets gained through forfeiture are to be dedicated to the rather vague purpose of "law enforcement," the documented personal use of property by government officials smacks of the "direct, personal, substantial pecuniary interest" in the administration of justice this Court has not permitted. *Tumey v. Ohio*, 273 U.S. at 523.

Historically, some of the first restrictions placed on the power of government to forfeit private property stemmed from concern over individuals having a financial stake in the outcome of successful forfeitures. *See* L.

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[7] For example, the DEA's Special Agent-in-Charge in Dallas had adorned his office with "an elegant coffee and end table set, two walnut china cabinets filled with decorative plates and rare figurines, several oil paintings, a video cassette recorder and console television . . . , ornamental clocks, and other assorted bric-a-brac. . . . In congressional hearings during the spring of 1987, the DEA found its agents driving seized Mercedes, Cadillacs and other luxury cars." Winn, *Seizures of Private Property in the War Against Drugs: What Process is Due?*, 41 Sw. L. J. 1111, 1128 (1988).

Schwoerer, *Declaration of Rights, 1689* 96. Article 12 of the English Declaration of Rights declared that "all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void." *See, e.g., Harmelin v. Michigan*, 111 S.Ct. 2680, 2686 (1991) (recognizing the English Declaration of Rights as the "antecedent of our constitutional text"). What the article aimed to eliminate was

> a practice that had grown up around the law of treason. The treason law provided that the property of a person convicted of treason was forfeited to the crown. The practice was for courtiers and others to solicit the forfeitures even before a judgment was rendered, thus creating a situation whereby they stood to benefit from a conviction. . . .

Schwoerer at 96. Although English estate forfeiture was abolished in this country by Article III, Section 3 of the Constitution (except for treason), the direct pecuniary benefit to law enforcement agencies who engage in forfeiture remains.

The entire current statutory scheme of federal civil forfeiture belies the notion that forfeitures are prosecuted by non-self-interested public officials. However, an analysis of the direct pecuniary benefits to government officials and agencies that engage in forfeiture is not an indictment of the integrity or character of the thousands of men and women at all levels of government who combat criminal activity on a daily basis; nor is it even an

indictment of the wisdom or feasibility of civil forfeiture in general.[8]

Rather, the purpose of examining the design of civil forfeiture law and the need for guaranteeing due process protections for property owners is to "differentiate between institutional arrangements that bring individual self-interest and the general welfare into harmony and institutional arrangements that leave them in conflict." *Public Choice and Constitutional Economics* 8 (J. Gwartney & R. Wagner, eds. 1988). The institutional arrangement and incentive structure behind civil forfeiture necessitates protection of the due process rights of property owners. Guaranteeing due process rights for property owners will help channel self-interest away from unjustified applications of forfeiture laws to boost agency revenue and toward genuine efforts to eliminate criminal activity.

II. THE REQUIREMENT OF NOTICE AND A HEARING FOR REAL PROPERTY OWNERS WILL PROTECT PRIVATE PROPERTY RIGHTS WITHOUT DAMAGING THE GOVERNMENT'S INTEREST IN STOPPING ILLEGAL ACTIVITY

The contemporary application of civil forfeiture has placed at loggerheads two fundamental assumptions of American law: "(1) that crime does not, or at least *should* not, pay, and (2) that property rights are a fundamental

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[8] *See* D. Farber and P. Frickey, *Law and Public Choice* 117 (1991) (emphasizing the enforcement of structural and procedural constraints on the exercise of government power over stricter scrutiny of the substance of legislation).

aspect of individual freedom." Pratt & Petersen, *Civil Forfeiture in the Second Circuit*, 65 St. John's L. Rev. 653, 655-56 (1991). Several commentators have noted that "[a]s civil forfeiture has been used with increasing aggressiveness, the discord between these two assumptions has increased to a point at which they seem unable to coexist." *Id.* at 656; *see also* Reed, *American Forfeiture Law: Property Owners Meet The Prosecutor*, Pol'y Analysis, Cato Inst., Sept. 29, 1992. Whatever the tension in other aspects of civil forfeiture, a requirement of notice and hearing in forfeiture of real property will preserve the importance of protecting private property owners from unjustified deprivation without damaging the government's substantial interest in curtailing criminal activity.[9]

A. *Rights to private property and the peaceful enjoyment of one's home are deeply rooted in our heritage and explicitly protected by the Constitution.* The right to acquire, own, and use property is of enormous constitutional significance. Indeed, this Court has recognized that "[t]he great end for which men entered into society was to secure their property." *Boyd v. United States*, 116 U.S. 616, 627 (1886) (quoting Lord Camden, J. in *Entick v. Carrington and Three Other King's Messengers*, T. Howell, 19 Howell's State Trials 1029, 1066). The importance of private property in our tradition of law was aptly captured by Blackstone in the first pages of his *Commentaries*:

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[9] Although this section of the brief addresses the interests in private property and the contrasting governmental interests at stake under factors established by this Court in *Calero-Toledo*, the same reasoning would apply under the three-part due process analysis of *Matthews v. Eldridge*, 424 U.S. 319 (1976).

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

W. Blackstone, *Commentaries* 2 (1765).

One of the more important and revered rights of property ownership is the right to control and peacefully enjoy one's home. *See Payton v. New York*, 445 U.S. 573, 601 (1980) ("the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic"). As this Court declared in *Silverman v. United States*:

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty – worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

Id. at 365 U.S. 505, 511-12 n.4 (1961) (quoting *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting)). The sanctity of the home predates the founding of the United States. Early Anglo-Saxon law recognized the rights of homeowners above nearly all else: "[a] 'breach of the peace' in itself means nothing, for there is no general peace of the community, but only the thousands of islands of peace which surround the roof-tree of every householder, noble and simple. . . . " J.E.A. Jolliffe,

The Constitutional History of Medieval England 8 (1961); *see also* W. Blackstone, *Commentaries* 223 ("The law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity"). The government must meet a substantial burden to justify immediate seizure of such an important and cherished right.

B. *The governmental interests in immediate seizure of real property do not constitute an "extraordinary" situation justifying denial of notice and a hearing.* In contrast to the great constitutional importance of property in general and the home in particular, the governmental interests in immediate seizure and forfeiture of real property without notice or hearing are insubstantial. In *Calero-Toledo*, 416 U.S. at 679, immediate seizure of a yacht for forfeiture was upheld because the property seized was of the sort that could be "removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." The Ninth Circuit, in balancing the property owner's interest with that of the government, rightly noted the practical differences between the easily hidden or destroyed personal property of *Calero-Toledo* and the immobile real property of the instant case. As the court so crisply put it, "[t]he house is not going anywhere." *United States v. James Daniel Good Real Property*, 971 F.2d 1376, 1383-84 (9th Cir. 1992). These factual distinctions between personal and real property should also be considered by this Court in determining whether immediate seizure of real property is truly an "extraordinary" situation requiring departure from due process rights.

In arguing against requiring notice and a hearing to property owners, petitioner and its *amici* also point to the "possible danger to the seizing agents if the owner or occupant is tipped off in advance." Brief for the United States at 30; Brief for *Amici Curiae* States of Kentucky, *et al.*, in Support of Petitioner at 7-9. While it is possible that some property owners may face government agents with a "last stand" mentality even after notice and a hearing, the practical experience in seizures of real property leads to exactly the opposite conclusion: sudden and unannounced raids of homes by heavily armed police, often in the middle of the night, are much more likely to produce danger to both the agents and the homeowner.[10]

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[10] ABC News recently chronicled the unannounced seizure of a couple's home in California for alleged cultivation of marijuana. The wife of the slain homeowner told what happened:

> We were in bed, asleep, and the house started shaking, and the dogs were going crazy. I got up as fast as I could to get dressed. And I was going to the door. . . . At that point, the door burst open, and I just saw all these guns. And I didn't know who they were or what they were doing. I just screamed: "Don't shoot me. Don't kill me." . . . My husband heard me. And he came running into the living room. I heard him say, "Frances, are you all right?" He had his gun pointed above his head. . . . Someone yelled: "Put your gun down. Put your gun down. Put your gun down." Bang. My husband fell right down in front of me.

"Death of Donald Scott," *Transcript of ABC News' 20/20*, (April 2, 1993).

Not only would notice and a hearing have prevented the taking of a life in this case, the hearing also would have demonstrated the innocence of the homeowners – no marijuana was ever found on the property.

Amici for petitioner also raise the specter of "crackhouses" in claiming that a requirement of notice and hearing would frustrate the government's efforts to seize and forfeit "real property associated with the illicit drug industry." Brief of *Amici Curiae* at 8. When raising the possibility of danger to agents and the threat of thriving crackhouses, petitioner and its *amici* ignore an important caveat of the appeals court's holding. The Ninth Circuit held that the Due Process Clause requires notice and hearing to real property owners before seizure *unless an emergency situation exists. James Daniel Good Real Property*, 971 F.2d at 1384. While not creating an automatic exception to due process requirements as urged by the government, the appeals court's holding allows for immediate seizure of real property when the public's or law enforcement officers' safety is at particular risk.

C. *Fourth Amendment guarantees and Justice Department internal policy positions are inadequate protections against unjustified and mistaken deprivations of property.* The government claims that the only constitutional protection for the property rights of the homeowner in the instant case lies in the Fourth Amendment's protection against unreasonable searches and seizures. Brief for the United States at 24-35. The government opposes the application of the Fifth Amendment to civil forfeiture cases because most due process requirements apply to "civil cases outside the context of law enforcement and forfeiture." Brief for the United States at 24. This same term, however, the government argued that forfeiture was primarily a civil proceeding and should not be analyzed under constitutional requirements involving criminal law. *See* Brief for the United States, *Austin v. United States*, No. 92-6073

(arguing that the Eighth Amendment's prohibition on cruel and unusual punishments should not apply to civil forfeiture). Apparently, from the perspective of the government, the question of whether forfeiture is a civil or criminal proceeding turns on which provision of the Constitution the government wishes to evade.

By concentrating exclusively on the protections afforded property owners under the Fourth Amendment, the government overlooks other constitutional protections for property rights, most notably the Fifth Amendment's protection against deprivations of property without due process of law. Moreover, petitioner ignores the different underlying purposes of specific protections in the Bill of Rights. While the purpose of the Fourth Amendment is to guard against unreasonable searches and seizures, the "two central concerns of procedural due process [are] the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process." *Marshall*, 446 U.S. at 242.

The risk of unjustified deprivations and the great need for participation of interested parties is particularly strong in the context of real property forfeiture. Reports of "unjustified and mistaken" deprivations of property due to civil forfeiture abound.[11] One of the main reasons for unjustified and mistaken forfeitures of homes and other real property – and why constitutional protection

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[11] For a particularly gripping and well-documented account of wrongful and mistaken deprivat ons of property due to civil forfeiture, *see Presumed Guilty: The Law's Victims in the War on Drugs*, The Pittsburgh Press, August 11-16, 1991.

cannot be limited to Fourth Amendment guarantees – is the clash between the ancient concept of civil forfeiture and the modern nature of real property rights. Civil forfeiture is premised on the legal fiction that the property itself is "guilty" of illegal activity. Problems arise in real property forfeiture, however, because "[s]everal parties can simultaneously hold an interest in a single piece of real property. When the illegal action of one interest holder subjects a parcel of real property to forfeiture, the rights of the remaining interest holders are jeopardized." Note, *Civil Forfeiture of Real Property*, 10 Pace L. Rev. 485, 486 (1990); *see also* Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. Rev. 217 (1992).

Some of the owners of varied interests in a single parcel of land today include fee owners, mortgagees and creditors with security interests in the property, tenants with leasehold interests, and the holders of future interests. Most of these interests eventually would qualify as "innocent owners" under civil forfeiture statutes. *See* 21 U.S.C § 881(a)(6). Even "innocent ownership" claims, however, require "judicial validation." *See* Note, 72 B.U. L. Rev. at 219. Such "validation" under current precedent may take several months, if not more than a year. *See United States v. $8,850*, 461 U.S. 555 (1983) (no due process violation for filing of forfeiture action eighteen months after seizure). Seizure of real property without notice or an opportunity to be heard seriously compromises these interests while the forfeiture action and claims of innocent ownership slowly proceed in the courts. Pre-seizure

notice and a hearing to those with interests in real property would minimize unjustified or mistaken injuries to those interests and allow parties to take steps to protect their rights in the property.

Requiring notice and hearing to those with interests in real property will also fulfill the second concern of procedural due process, "the promotion of participation and dialogue between affected individuals in the decision-making process." *Marshall*, 446 U.S. at 242. Notice and an opportunity for a hearing would allow participation by these parties in determining whether seizure of real property is necessary or whether less intrusive methods of securing the government's interest (and their own) are available, such as the filing of a *lis pendens*, restraining order, or the posting of a bond.[12] Petitioner's argument would allow for the summary seizure of real property, under any circumstances, without notice or an opportunity to be heard for any of the interested parties who may find their rights suddenly compromised and difficult to regain.

In addressing the rights of property owners when confronted with seizure and forfeiture of real property,

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[12] One appeals court has admonished district courts to take such measures:

> The district courts, in order to preserve some modicum of due process to . . . civil forfeiture claimants should be vigilant in approving seizures *ex parte* only upon a showing of the most extraordinary or exigent of circumstances, and whenever possible should favor less drastic measures.

United States v. All Assets of Statewide Autoparts, Inc., 971 F.2d 896, 905 (2d Cir. 1992).

the government points to Justice Department policy as providing adequate protection to those with interests in real property. Brief for the United States at 12-14. According to Justice Department guidelines, "occupants of real property seized for forfeiture are permitted to remain in the property pursuant to an occupancy agreement pending forfeiture," if a number of conditions are met. Directive No. 90-10 (1990) at 2. Petitioner also points to the facts of the instant case whereby tenants were allowed to remain on the property pending forfeiture.

Apart from the failure of Justice Department policy to protect property interests beyond those of occupants, this Court should reject the argument that the policy positions of a prosecutorial government agency are an adequate safeguard for the constitutional rights of owners of property interests. The United States pursued a similar argument from policy in a recent forfeiture case before this Court. *United States v. A Parcel of Land, Bldgs., Appurtances, and Improvements Known as 92 Buena Vista Ave., et al.*, 113 S.Ct. 1126 (1993). In arguing that title to property vests irreversibly in the government from the time property is used in illegal activity, the government pointed to Justice Department policy that would mitigate any harm this position would cause "innocent owners." Such assurances were considered by this Court inadequate to protect the statutory rights of innocent owners.[13]

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[13] In responding to the government's assurances during oral argument, this Court stated: "I know you're very generous and wouldn't do it, but we're talking law, not policy." Transcript of Oral Argument in *A Parcel of Land* . . . (Oct. 13, 1992). Despite the generosity of the government in not summarily removing tenants in the instant case, their decision was merely one of administrative grace.

Likewise, Justice Department policy should not be afforded substantial weight in the instant case. Policy positions are not a substitute for the safeguarding of constitutionally protected property rights.

The requirement of notice and an opportunity to be heard before deprivations of property is a cornerstone of our civil liberties. Though usually a minor hurdle for responsible law enforcement officials, it nonetheless creates a mighty bulwark against the overzealous use of government's powers. Nowhere are the financial incentives to abuse these powers greater than in the civil forfeiture area – hence, nowhere is the need greater to safeguard against such abuses.

CONCLUSION

For all the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this honorable Court affirm the opinion below.

Respectfully submitted,

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Supreme Court of the United States

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Supreme Court, U.S.
FILED
JUN 11 1993
OFFICE OF THE CLERK

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JAMES DANIEL GOOD REAL PROPERTY, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF HAWAII IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Hawaii is one of its statewide affiliates.

Earlier this Term, the ACLU submitted an amicus curiae brief arguing that the proportionality principles of the Eighth Amendment should apply to civil forfeiture. *Austin v. United States*, No. 92-6073 (argued April 20, 1993). In this case, we support Good's claim that the absence of a pre-seizure hearing violates due process. As both cases demonstrate, the increasing use of civil forfeiture for punitive purposes poses a serious threat to the interests of the ACLU and its affiliates. Accordingly, we submit this brief as *amici curiae* to assist the Court in its deliberations.[2]

SUMMARY OF ARGUMENT

This case began when the government seized the home of James Daniel Good without notifying him in advance or giving him an opportunity for a hearing. The government exercised this authority pursuant to 21 U.S.C. §881, which provides for civil *in rem* forfeiture of real property "which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" a federal drug offense.

As this case illustrates, the broad interpretation of

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] This brief is limited to the due process questions presented by the petition for *certiorari*. It does not address the statute of limitations issue that is also before the Court. *See* Pet.Cert. at i.

civil *in rem* forfeiture advocated by the government has gone far beyond its historical roots. The contention that modern forfeiture law is nothing more than the continuation of an ancient and historically validated practice is, therefore, misleading. Forfeitures were originally limited to contraband or objects that had caused direct injury. Good's home fits into neither category. The notion that it is nonetheless subject to seizure is a recent invention that corresponds neither to history nor to our contemporary sense of constitutional values.

This Court has frequently held that due process requires an opportunity to be heard before one's property is seized, except in "extraordinary situations." *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972). That exception does not apply here. Any claim that time was of the essence is belied by the fact that the government waited four and one-half years before instituting these forfeiture proceedings. And, unlike a car or yacht, the government can hardly assert that Good's home was in danger of being moved before a hearing could be held.

Indeed, the government does not seriously dispute the need to engage in a due process analysis. Instead, it argues that Good received all the process that was due when the government obtained an *ex parte* warrant authorizing the seizure of his home. *Ex parte* procedures, however, do not meet the demands of due process in this context. The risk of erroneous deprivation is simply too great, especially when the property in question is a person's home. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). In addition, the warrant procedures of the Fourth Amendment were never designed to seize property, like Good's home, that is not contraband nor evidence nor an instrumentality of crime.

Finally, the seizure of Good's home under the circumstances of this case is clearly punitive, both in purpose and effect. Before punishing Good in this fashion, the government should be required to comply with the

procedural safeguards that normally attend a criminal proceeding. The value of those safeguards would be greatly diminished if they could be avoided by the simple expedient of labeling the forfeiture proceeding civil rather than criminal.

ARGUMENT

I. THE HISTORY OF FORFEITURE DOES NOT SUPPORT THE SEIZURE OF GOOD'S HOME WITHOUT A HEARING

"[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). In this case, therefore, consideration of what process Good is due prior to seizure of his home appropriately begins with an analysis of the history of forfeiture.

Courts seeking to justify the absence of due process protections for claimants in civil *in rem* forfeiture proceedings have traced the roots of modern civil *in rem* forfeiture to common law and early American forfeiture practices. Accordingly, many modern cases rejecting challenges to civil *in rem* forfeiture are premised on the notion that courts are not writing on a clean slate and are essentially tied to a historical notion of forfeiture. In fact, modern forfeiture has been expanded far beyond its historical roots. Thus, a proper reading of the history of forfeiture cannot justify denial of due process protections where, as here, the forfeiture is not remedial but punitive.

The legal fiction that civil forfeiture penalizes the guilty property, rather than the guilty property owner,

long ago outlived its usefulness as an analytic tool for constitutional decisionmaking. Its origins have been traced as far back as Biblical times,[3] and vestiges of the idea are found in ancient Greek and Roman Law,[4] but in the thousands of years that have passed since the fiction began, no nation has so expanded and so abused the fiction as the United States since the Civil War.[5] Ironically, the expansion of the fiction has not been based on moral or constitutional grounds, but has instead been justified as an historical remnant, "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921). *See also United States v. U.S. Coin & Currency*, 401 U.S. 715, 719-20 (1971)(commenting that, although the fiction is "remarkable," broad forfeiture laws are justified by centuries of history).

History alone, however, can neither explain nor justify the dramatic expansion of civil forfeiture during the last ten years as a punitive measure to confiscate and condemn property that was not contraband, vehicles that were not carrying contraband, and homes that were only tenuously connected to contraband. *See, e.g., One Blue*

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[3] *See* Jacob J. Finkelstein, "The Goring Ox: Some Historical Perspectives On Deodands, Forfeitures, Wrongful Death And The Western Notion Of Sovereignty," 46 Temp.L.Q. 169 (1973).

[4] Walter Woodburn Hyde, "The Prosecution And Punishment Of Animals And Lifeless Things In The Middle Ages And Modern Times," 64 U.Pa.L.Rev. 696 (1916).

[5] In England, for example, forfeiture statutes almost always require a criminal conviction and criminal procedures before property can be taken. Civil *in rem* forfeiture is very rare and always limited to property that is inherently dangerous or contrary to the public interest. *See* Sir Derek Hodgson, PROFITS OF CRIME AND THEIR RECOVERY (Heinemann, London 1984) 32, 94-98 (American forfeiture is justified by a misnomer, *i.e.* "civil" forfeiture is really penal); *see also* 1 David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES (1992), ¶1.02 at 1-14 n.21 (Germany has a proportionality limitation).

1977 AMC Jeep CJ-5 v. United States, 783 F.2d 759 (8th Cir. 1986)(allowing forfeiture of jeep used to transport individual found *not guilty* of any offense); *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424 (11th Cir. 1983)(allowing forfeiture of car used to transport person to drug deal that never took place); *United States v. Premises Known As 3639-2nd St., N.E.*, 869 F. 2d 1093, 1096 (8th Cir. 1989)(holding that using or intending to use real property as site for drug transaction will render it subject to forfeiture); *United States v. One Parcel of Real Estate Known As 916 Douglas Ave.*, 903 F.2d 490 (7th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991)(upholding forfeiture of home based on homeowner's use of telephone to negotiate drug transaction).

Indeed, historical forfeiture was never so broad as it is today. Up until the Civil War, every nation in every era that relied on the fiction of the guilty property to justify forfeiture used it only to confiscate contraband or the objects that had themselves *directly* participated in a crime.[6] For example, the early Greeks and Romans used the fiction only to confiscate objects that had actually taken a human life.[7] The Biblical reference to the "goring ox," cited in *Goldsmith-Grant Co.*, 254 U.S. at 511, only permitted the taking of an ox that had gored a man to death.[8] The English concept of the deodand, which is so heavily relied upon to justify modern forfeiture, only applied to "objects . . . which [were] the *direct* agents of a man's death."[9] Finkelstein, *supra* note 3, at 185 (em-

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[6] *See generally* James R. Maxeiner, "Bane Of American Forfeiture Law -- Banished At Last?", 62 Cornell L.Rev. 768 (1977).

[7] Hyde, *supra* note 4, at 696-701.

[8] Hyde, *supra* note 4, at 700.

[9] As Blackstone explained, if a man was killed by climbing on a wagon wheel, only the wheel was deodand, not the rest of the wagon. Hyde, *supra* note 4, at 727.

phasis added).[10]

To be sure, forfeiture expanded over the years and, not surprisingly, the expansions typically occurred during times of substantial change in society. The first great expansion occurred in England with the passing of the Navigation Acts of the mid-seventeenth century. Until then, forfeiture was generally limited to goods on which duties had not been paid. The Navigation Acts abolished those limitations. Maxeiner, *supra* note 6, at 774; 1 Smith, *supra* note 5, ¶2.03 at 2-8 (1992). For the sake of national seapower, the Navigation Acts required that commodities be shipped in English-built, owned and crewed vessels and the penalty for violation was a forfeiture of both the ship and the cargo. By permitting the forfeiture of the ship and the cargo and by imposing a form of strict liability on the ship owner, the Navigation Acts went further than any forfeiture statute ever enacted in England up to that time. Maxeiner, *supra* note 6, at 774. 1 Smith, *supra* note 5, ¶2.03 at 2-8.[11]

Early American forfeiture carried over much of the English tradition, including its limitations. Like its English counterpart, *in rem* forfeiture was purely remedi-

[10] Ironically, the British never relied on the deodand to justify their forfeiture laws. They recognized that "goods as goods, cannot offend . . . but [only] men whose goods they are." Maxeiner, *supra* note 6, at 771 (quoting *Mitchell qui tam v. Torup*, Parker 227, 145 Eng.Rep. 764 (Ex. 1766)). Deodands were eventually abolished in England in 1846. Finkelstein, *supra* note 3, at 170.

[11] Yet, despite their expansiveness for the time, the Navigation Acts pale in comparison to modern American forfeiture. The forfeiture of the ship and the cargo was roughly equivalent to the early American customs acts, where seemingly harmless goods were made contraband. A violation of the Acts required the shipping of cargo in an illegally built, owned or crewed vessel. The vessels and the cargo were not merely tools of the crime, but were both elements of the offense. They were the very evil that the statute sought to protect, and still, the Acts were considered expansive.

al. It was originally used to seize contraband and enforce customs laws, and only slowly expanded to include the confiscation of objects that were not themselves contraband but which were directly used in crime, 1 Smith, *supra* note 5, ¶2.03, at 2-9 (1992), such as vessels involved in piracy, slave-running and smuggling. *Id.* at ¶1.02 at 1-15, n.23. *See also* Tamara R. Piety, "Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process," 45 U. Miami L.Rev. 939-40 (1991). Of crucial importance, however, forfeiture remained limited to property directly used in crime. For instance, in 1844 this Court found that under the law of nations, a pirate ship could be forfeited as the only way to insure "indemnity to the injured party." Yet its cargo had to be returned to its owner. The ship was "guilty," while the cargo was not. *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 235-37 (1844).

It was not until the Civil War that forfeiture laws began to expand well beyond their historical basis. Under the Confiscation Act of 1861, 12 Stat. 589 (the "Act"), Congress authorized the condemnation of property owned by Southern rebels accused of treason despite the negligible connection between the property and the crime, and the clear *punitive* nature of the sanction. The Act was met with considerable protest, with one Senator calling it "hocus-pocus"[12] and one state court predicting that "[t]hese [*in rem*] proceedings may to-day be the engines of punishment to the rebels, but, in the future, they may be the instruments of oppression, injustice and tyranny . . . ."[13] Nevertheless, the Act was upheld by the Supreme Court as a war powers measure. *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1871). In a scath-

[12] Maxeiner, *supra* note 6, at 786 (quoting Cong. Globe, 37th Cong., 2d Sess. 1574, 1809 (1862)(remarks of Senator Collamer).

[13] Maxeiner, *supra* note 6, at 787 (quoting *Norris v. Doniphan*, 61 Ky. (4 Met.) 385, 426 (1863)).

ing dissent, Justice Field warned that the Act "works a complete revolution in . . . criminal jurisprudence." *Id.* at 323 (Field, J., dissenting).[14]

Since that time, courts have ignored the war powers justification for the Confiscation Act and have steadily expanded the concept of forfeiture, catching more and more in the forfeiture net while claiming to be bound by historical precedent. Lawrence A. Kasten, Note, "Extending Constitutional Protection to Civil Forfeitures That Exceed Rough Remedial Compensation," 60 Geo. Wash.L.Rev. 194, 202 (1991); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878)(permitting the seizure of a distillery and other property "connected with" the distillery based on the "guilt" of the property in violating the revenue laws).[15]

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[14] It is interesting to note what one supporter of the Act had to say about the guilty property fiction:

> This being the law, there is really no foundation whatsoever for the doctrine of an offending thing. To say that an inanimate thing incapable of volition or action, is an offender against the law, is a mere rhetorical flourish . . . . It is bad in every point of view, a poor specimen of legal metaphor, of strained fancy and foggy metaphysics. Indeed, it is but a legal fiction, which, like the "Will-o-the-wisp" or Jack with his lantern, the more it is admired and the further it is pursued, the greater the dangers and delusions to which it subjects, to say nothing of the inextricable and perplexing quagmires into which it leads its charmed pursuers.
>
> How idle and visionary then to talk about an offending thing! Property commits no crimes.

L. Madison Day, The Constitutionality And Legality of Confiscations In Fee, Under Act of July 17, 1862, at 65 (New Orleans 1870).

[15] In fact, before the Confiscation Acts there had always existed *in personam* forfeiture prosecutions which were penal in nature and required a suit against the person, not the property. But once the Court had permitted *in rem* suits to occur against property not directly con-
(continued...)

The next great expansion in United States' forfeiture law occurred during prohibition. Most significantly, in *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, the Court permitted the forfeiture of a car transporting liquor in violation of the revenue laws. From that point on, courts have relied on *Goldsmith*, the deodand, and the guilty property fiction to justify virtually any kind of forfeiture. *See* Maxeiner, *supra* note 6, at 792. As this Court prophetically observed in *Goldsmith*:

> [i]t is said that a Pullman sleeper can be forfeited if a bottle of illicit liquor be taken upon it by a passenger, and that an ocean steamer can be condemned to confiscation if a package of like liquor be innocently received and transported by it . . . . *[The act] has been in existence since 1866, and has not yet received such amplitude of application. When such application shall be made it will be time enough to pronounce upon it.*

254 U.S. at 512 (emphasis added).

The forfeiture laws have now reached the proportions foreshadowed in *Goldsmith*. These laws are the cancerous growths of an historical anachronism, thrust into a modern age without modern procedural protections, and they cry out for limitation.

Today the government uses *in rem* civil forfeiture statutes not just to confiscate illegal property or property specifically designed to perpetrate drug use and distribution, but also to confiscate property, like Good's home, which was neither designed to promote the drug trade nor instrumental in a drug transaction. The legal fic-

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[15] (...continued)
nected with the wrongdoing, and sanctioned *in rem* forfeiture that was essentially criminal in nature, *in personam* suits disappeared, and modern forfeiture was born. Maxeiner, *supra* note 6, at 788.

tions used to justify these forfeitures have no place in a nation with a long tradition of taking property and due process rights seriously. Where, as here, civil *in rem* forfeiture is no longer grounded in its original remedial justification, the government can no longer rely on the "guilty property" fiction to obscure the punitive impact of forfeiture on individuals like Good.

II. SEIZURE OF GOOD'S HOME WITHOUT NOTICE AND A HEARING VIOLATED HIS RIGHT TO DUE PROCESS

A. Under The Fifth Amendment, Good Is Entitled To Notice And A Hearing Prior To Seizure Of His Home

The Fifth Amendment to the United States Constitution guarantees that no person shall "be deprived of life, liberty, or property, without due process of law." As consistently construed by this Court, due process requires "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)(emphasis in original)(footnotes omitted).

In *Fuentes v. Shevin*, 407 U.S. at 90, this Court made clear that such "extraordinary situations" must be "truly unusual."

> Only in a few limited situations has this Court allowed outright seizure without opportunity for prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Id. at 90-91.

Here, there was no "special need for very prompt action" to justify the government's seizure of Good's home without the opportunity for a prior hearing. The events giving rise to the forfeiture of Good's home took place more than four and one-half years prior to the seizure. The government has not asserted that the seizure was necessary to thwart ongoing drug activity. The government's assertion that pre-seizure notice and hearing would jeopardize the security of the property is refuted by two simple facts: (1) Good was not living in the home (or even in the country) at the time of the seizure; and (2) the government allowed Good's tenants to continue occupying the home after the seizure. Accordingly, under *Fuentes*, Good was clearly entitled to a pre-seizure hearing. *United States v. Premises and Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1265 (2d Cir. 1989) (holding, in proceeding for drug-related forfeiture, that seizure of land without notice to homeowner and opportunity for adversary hearing violated due process).

Good's entitlement to a pre-seizure hearing is equally clear under the familiar balancing test of *Mathews v. Eldridge*, 424 U.S. 319, which determines the ingredients of due process in any given situation by weighing the public and private interests involved and the likelihood that error can be avoided through additional procedural safeguards.

Good's interest in maintaining control over his home is obvious. Indeed, this Court has consistently recog-

nized that an individual's interest in his home is entitled to greater constitutional protection than any other type of property. *See, e.g., United States v. Karo*, 468 U.S. 705, 714 (1984)("[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable"); *United States v. Reed*, 572 F.2d 412, 422 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978)("[O]ne's reasonable expectation of privacy in the home is entitled to unique sensitivity from federal courts"). The fact that Good was temporarily in Nicaragua at the time of the seizure of his home does not diminish its significance to him as a place entitled to special due process protection. Good's continuing attachment to his house as a home is amply demonstrated by evidence in the record that he continued to store many of his possessions there and stayed there whenever he returned to Hawaii.

The risk of erroneous deprivation absent a pre-seizure hearing has long been acknowledged by this Court:

> [W]hen a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Fuentes v. Shevin, 407 U.S. at 81 (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72 (1951)(Frankfurter, J., concurring). Accordingly, "[i]n

almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

Finally, the government in this case had no legitimate interest in seizing Good's home without a hearing. The court below correctly determined that, given the immobility of Good's home and the government's four-and-one-half-year delay in instituting the seizure, there was no need for prompt action in this case. By contrast, in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the Court was clearly concerned that a pre-seizure hearing might give the yacht owner time to remove his yacht from the jurisdiction. That concern is entirely absent from this record.

B. The Fourth Amendment Does Not Eviscerate The Fifth Amendment

Notwithstanding the government's argument that "[c]ompliance with the standards and procedures prescribed by the Fourth Amendment constitutes all the 'process' that is 'due' under the Fifth Amendment," Brief for the United States at 10, the Fourth Amendment does not displace or eviscerate the protections guaranteed to property owners under the Fifth Amendment. In *Soldal v. Cook County*, 506 U.S. __, 113 S.Ct. 538, 548 (1992), this Court recently declared:

> Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's dominant character. Rather, we examine each constitutional provision in turn.

Where, as here, the Fifth Amendment requires addi-

tional procedural protections, the government cannot evade its obligations to provide those protections by invoking the Fourth Amendment. Likewise, the government cannot rely on the *ex parte* procedures of the Fourth Amendment to satisfy the demands of due process triggered by the government's effort to forfeit Good's home.

1. The *Ex Parte* Procedures Of The Fourth Amendment Do Not Satisfy Due Process In The Civil Forfeiture Context

The fallacy of the government's argument that the Fourth Amendment trumps the Fifth Amendment in "civil" forfeiture cases is made even clearer by this Court's recognition that the Fourth Amendment is specifically tailored for the "criminal justice system." *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975). Ironically, the government includes in its brief a quote from *Gerstein* which explains the specific applicability of the Fourth Amendment to the criminal context:

> The Fourth Amendment was tailored explicitly for the *criminal* justice system, and its balance between individual and public interests has always been thought to define the "process that is due" for seizures of persons or property in *criminal* cases, including the detention of suspects pending trial.

Id. (emphasis added).

The government's argument that, in a civil *in rem* forfeiture proceeding, "[t]he defendant property therefore at least should be subject to seizure in the same manner as the defendant individual in a criminal prosecution," overlooks the fact that in a criminal prosecution, "the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those

accused of criminal conduct." *Id.* (emphasis in original). In the criminal setting, the Due Process Clause of the Fifth Amendment requires substantial procedural protections in addition to those mandated by the Fourth Amendment. These procedural protections are denied to defendants and claimants in civil *in rem* forfeiture actions. While minimal process may be appropriate during the seizure stage in the criminal setting in light of these additional safeguards, it is not appropriate during the seizure stage of *in rem* forfeiture, which has virtually no additional safeguards. The Fourth Amendment was adopted specifically for the criminal justice system, and has been applied in the civil context only as a means of *extending* to litigants due process protections that might not otherwise be available in a civil case. *See, e.g.*, *Soldal v. Cook County*, 113 S.Ct. 538; *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). It has never been used as a limitation on Fifth Amendment rights.

2. The Fourth Amendment Is Not Applicable To Seizures Of Real Property For Civil Forfeiture

Not only has the Fourth Amendment never been used as a limitation on Fifth Amendment rights, it has also never been used to seize real property with only tenuous connections to an underlying crime.

Modern search and seizure law permits the seizure of four types of property: (1) fruits of a crime, *i.e.*, stolen goods; (2) contraband; (3) evidence of a crime; and (4) objects used as a means of committing a crime. Fed.R.Crim.P. 41(b); *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 309 (1967). In seeking to apply the Fourth Amendment to the seizure of Good's home, the government ignores these limitations and instead tries to create a new category of permissible seizures that would allow the seizure of virtually any property, no

matter how tangentially related to criminal activity.[16]

The history of searches and seizures makes this danger all the more clear. Early British common law only permitted the search and seizure of stolen goods. John Kaplan, "Search and Seizure: A No Man's Land In The Criminal Law," 49 Cal.L.Rev. 474, 475 (1961). Eventually, that category was expanded to include the seizure of all contraband, *i.e.*, any good that a citizen could not lawfully possess. *United States v. Parcel of Land, Bldgs., Appurtenances & Improv.*, 507 U.S. ___, 113 S.Ct. 1126, 1133 n.15 (1993)(hereinafter "*Buena Vista*").

United States' law was as strict as England's, so that by the start of the twentieth century the government was still only permitted to seize articles that were either stolen or contraband. *See, e.g., Boyd v. United States*, 116 U.S. 616 (1886). The law was expanded somewhat in the early 1900's to include articles used as the means or instrumentality of a crime. Still, even that expansion was strictly limited to items that were directly involved in the crime, *i.e.*, murder weapons, gambling paraphernalia, etc. *Buena Vista*, 113 S.Ct. at 1133 (explaining that the "[g]overnment had power to seize only property that 'the private citizen was not permitted to possess'")(citations omitted); Kaplan, *supra* p.16, at 477; *Adams v. New York*, 192 U.S. 585, 598 (1904).

After this Court decided in *Gouled v. United States*, 255 U.S. 298 (1921), that the Fourth Amendment did not permit seizures of "mere evidence," the notion of "instrumentalities" began to expand into articles more akin to

[16] As Justice Frankfurter said over forty-five years ago: "[S]light extensions from case to case gradually attain a considerable momentum from 'judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of legality but which, in reality, strike at the substance of the constitutional right.'" *Davis v. United States*, 328 U.S. 582, 610-11 (1946)(Frankfurter, J., dissenting)(partially quoting *Byars v. United States*, 273 U.S. 28, 33-34 (1927)).

evidence than instrumentalities, so that by the time the "mere evidence" rule was finally rejected in *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, the difference between instrumentalities and "mere evidence" was difficult to discern. *See* Comment, "Limitations on Seizure of "Evidentiary" Objects: A Rule in Search of a Reason," 20 U.Chi.L.Rev. 319 (1953). Even with this expansion, throughout the twentieth century an "instrumentality" was still strictly limited to items that were the direct means of committing a crime (even though they could invariably be used as evidence). *See, e.g., Garske v. United States*, 1 F.2d 620, 622 (8th Cir. 1924). As this Court explained in *Warden, Maryland Penitentiary*, 387 U.S. at 307, an instrumentality by its very nature requires a "nexus" to the underlying crime.[17]

Under this traditional definition, Good's home could never be considered an instrumentality -- and thereby subject to a Fourth Amendment seizure -- since it is neither the direct means of committing a crime nor evidence of a crime. *See, e.g., United States v. Certain Real Property And Premises Known As 38 Whalers Cove Drive,*

[17] The limitations on the word "instrumentality" or "means" to commit a crime is made all the more clear by this Court's recent decision in *Smith v. United States*, __ U.S. __, 61 U.S.L.W. 4503 (June 1, 1993), which interpreted a statute that penalized a person for making "use" of a firearm "during and in relation to" a violent crime. The Court looked to the everyday meaning of the word "use" as meaning to "employ."

On the other hand, before an article can be seized under the Fourth Amendment it not only must be "used" in the crime (as defined by *Smith*), but it also must be used as a "means" of carrying out the crime. The difference between "used" in a crime and used as a "means" of committing a crime is made clear by both BLACK'S LAW DICTIONARY and by *United States v. Loft on 6th Floor of Building*, 182 F. Supp. 322, 324-25 (S.D.N.Y. 1960). In *Loft on 6th Floor of Building*, the Southern District of New York refused to allow the seizure of an article which was "used" in the crime, because it was not used as a "means" of carrying out the crime.

954 F.2d 29, 36-37 (2d Cir. 1992).[18]

This traditional understanding of the Fourth Amendment is perhaps best captured by the response of a federal district judge when asked to approve the seizure of an entire brewing plant almost seventy years ago. To allow such seizures, the court wrote,

> entirely misconceive(s) the nature and purpose of a warrant of search and seizure . . . [A warrant] cannot be used as a cloak for dispossessing a man of his real estate . . . .
>
> [because] some regard should be had to the degree of connection between any given piece of property and its illegal use . . . *I doubt very much whether the statute authorizes the government to seize the hay that feeds the horse that hauls the cart that carries the hops, et cetera.*

Mellet & Nichter Brewing Co. v. United States, 296 F. 765, 768-70 (E.D.Pa. 1923)(emphasis added). Those very same doubts are no less appropriate today.

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[18] In *Warden, Maryland Penitentiary*, 387 U.S. at 303, this Court, citing Kaplan, *supra* p.16 at 475, traced the history of "instrumentalities" to the "early notion that items used in crime were forfeited to the State." If this is the true origin of instrumentality seizures, it adds further support to the argument that the Fourth Amendment cannot apply to modern forfeiture. Under common law, the forfeiture of goods to the Crown was only permissible if connected to a conviction and not as a result of "civil" proceedings. *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827). Thus, seizures of instrumentalities must be limited to forfeitures connected to a criminal trial, *i.e.*, criminal forfeitures. In addition, the seizure of instrumentalities would be limited to the same extent as historical forfeiture, which, as explained above, only applied to objects "directly" used in crime and nothing else.

III. BECAUSE THE FORFEITURE OF GOOD'S HOME IS PUNITIVE IN BOTH PURPOSE AND EFFECT, DUE PROCESS DEMANDS THAT GOOD BE AFFORDED THE CONSTITUTIONAL PROTECTIONS TRADITIONALLY ASSOCIATED WITH THE IMPOSITION OF CRIMINAL SANCTIONS

Given the punitive nature of the seizure in this case, due process demands that Good be afforded the constitutional protections traditionally associated with the imposition of criminal sanctions. This is true regardless of the label that is put on the forfeiture.

The government argues that seizure of Good's home is a Fourth Amendment seizure akin to "arrest," but fails to adequately explain why the "arrest" is not followed by the traditional criminal safeguards constitutionally required to follow an arrest. If, as the government argues, the original seizure is an "arrest" and criminal in nature, then full criminal procedures must follow.

Regardless of whether the government's arrest analogy is apt, this Court has determined that criminal procedures are constitutionally required when a deprivation of property is punitive in nature. *See* pp.21-22, *supra*. Since forfeiture of Good's home is plainly punitive rather than remedial, the hearing to which Good is entitled prior to deprivation of his property must include criminal due process protections.

A. The Distinction Between Civil *In Rem* Forfeiture And Criminal *In Personam* Forfeiture

Good's home was seized and forfeited under 21 U.S.C. §881(a)(7), which provides for the civil *in rem* forfeiture of real property "which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" federal drug offenses. 21 U.S.C. §881(b) provides that property subject to forfeiture

under this provision may be seized, without notice or a hearing, based on "probable cause" to believe that the property is forfeitable. The property, which is denominated the "defendant" in an *in rem* action, is presumed to be guilty until proven innocent. Once the government establishes probable cause to believe that the property is subject to forfeiture (which it may do based solely on hearsay), the property is forfeited unless the owner of the property proves by a preponderance of the evidence that the property is "innocent" or otherwise not subject to forfeiture.

By contrast, *in personam* criminal forfeiture statutes permit forfeiture of the same property, but require that defendants (who are people, not property) be afforded criminal due process protections. For example, 21 U.S.C. §853, like its civil counterpart §881, authorizes forfeiture of property "used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" federal drug offenses. However, to forfeit Good's home under §853, the government would have been required to convict him of a federal drug offense at a criminal trial where he would have been presumed innocent, hearsay would not have been admissible, and the jury would have been required to find proof of guilt beyond a reasonable doubt. Moreover, the government would not have been able to seize Good's home prior to forfeiture under §853 unless there had been a judicial determination that some less intrusive procedure, such as the issuance of a protective order or the posting of a bond, would not be sufficient to assure the availability of the property for forfeiture.

A comparison of the two statutory schemes prompts a troubling question: Why should Good's rights vary so dramatically based solely upon whether the forfeiture proceeding in which his property is taken is denominated civil or criminal?

B. The Forfeiture Of Good's Home Is Punitive

Constitutional rights have never depended upon labels but rather upon the actual impact of government action on individuals. The "civil" label placed on §881 by Congress is not determinative of the nature of forfeitures pursuant to that section, since "civil proceedings may advance punishment as well as remedial goals." *United States v. Halper*, 490 U.S. 435, 448 (1989). "A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 448 (emphasis added).

Indeed, this Court has on numerous occasions recognized the essentially "criminal" nature of certain forfeiture proceedings denominated "civil." For example, in *Boyd v. United States*, 116 U.S. at 634, this Court acknowledged that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal" and therefore claimants are entitled to the Fifth Amendment protection against self-incrimination. The *Boyd* Court exposed the fallacy behind the *in rem* fiction:

> [W]here the owner of the property has been admitted as a claimant, we cannot see the force of this distinction [between a proceeding against the property and one against the person]; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property as well as against the goods; for it is breach of the laws which has to be proved to establish the forfeiture and it is his property which is sought to be forfeited . . . In the words of a great judge 'Goods, as goods, cannot offend, forfeit, unlade, pay duties, or

the like, but men whose goods they are.'

Id. at 637 (citations omitted).

Accordingly, the *Boyd* Court held:

> [A]lthough the owner of the goods sought to be forfeited *in rem* is not the nominal party, he is, nevertheless, the substantial party to the suit; he is certainly so after making claim and defence; and in a case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense.

Id. at 638.

Similarly, in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, the Court held that evidence obtained in violation of the Fourth Amendment may not be relied on to sustain a forfeiture because "[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law." *Id.* at 700.

In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), this Court articulated a series of factors that bear on the question of whether a sanction is deemed a punishment:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation

> to the alternative purpose assigned . . . .

Id. at 168-69. An analysis of each of these seven factors leads inexorably to conclusion that, despite its "civil" label, the forfeiture of Good's home under the circumstances of this case is indeed punishment.

First, forfeitures of property that was not directly used in committing a crime were historically regarded as penal. As explained above, under early British common law, property that was not directly used in committing a crime could only be forfeited in connection with a criminal conviction. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. at 682. Until the Civil War, forfeitures in the United States were either *in personam* or *in rem*. *In rem* forfeitures were strictly limited to property that was directly used in committing a crime. All other forfeitures were *in personam* and were considered penal. Since Good's home was not directly used in a committing a crime, its forfeiture historically would have been considered penal and required an *in personam* criminal proceeding. *See* Maxeiner, *supra* note 6, at 788.

Second, the express purpose of §881(a)(7) is the infliction of an affirmative disability, or punishment, on individuals connected with drug activity in order to deter them from engaging in criminal behavior. In enacting §881(a)(7), Congress indicated its view that "traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish" drug dealers and that, "if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made." Congress explicitly recognized that "the prospect of the forfeiture of the property would have been a major deterrent" to drug dealers. Senate Report on proposed Comprehensive Crime Control Act of 1984, S. Rep. No. 225, 98th Cong., 2d Sess. 195, *reprinted in* 1984

U.S. Code Cong & Admin. News 3182, 3374, 3378.

Third, although the government is not required to prove scienter to forfeit property under §881(a)(7), the statute expressly provides that "no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

Fourth, although forfeiture under §881(a)(7) can occur without criminal charges ever being filed, property can be forfeited only if it facilitates the commission of a violation of federal drug laws "punishable by more than one year's imprisonment." Thus, §881(a)(7) applies to behavior that is already a crime and serves as an additional punishment for that behavior.

Fifth, as Congress envisioned, the forfeiture of Good's home was profoundly punitive in its effect on him, as it would be to any homeowner. There is no purpose other than punishment to which the forfeiture of Good's home may rationally be connected. The home was not in itself contraband and there is no allegation or indication in the record that the home was purchased with illegal drug profits. Consequently, the forfeiture of Good's home does not serve the traditional remedial goals of eliminating illegal substances from commerce or dispossessing criminals of their ill-gotten gains.

Sixth, by the time the United States seized and forfeited Good's home, more than four years had elapsed since Hawaii state authorities investigated, arrested, charged, and punished Good with imprisonment for drug trafficking. Good had completed his state sentence of incarceration and was complying with the conditions of his probation by leading a law-abiding life. Accordingly, state authorities had already accomplished the remedial goal of interdicting drug activity. There was no allegation or evidence that Good's home was being used to fa-

cilitate ongoing criminal activity at the time of the seizure and forfeiture, nor did the government have any reason to believe that the property would be so used in the future. Indeed, the federal government's four-and-a-half-year delay in seizing the property vitiates any claim that forfeiture of Good's home was necessary to prevent ongoing criminal activity.

Finally, the fact that the government has an economic interest in forfeiture to fund law enforcement activities does not make the forfeiture of Good's home any less punitive. The use of assets forfeited for punitive purposes to serve remedial goals does not change the fact that the underlying purpose and effect of the sanction is deterrence and retribution.

C. Given The Punitive Nature Of The Forfeiture Of His Home, Good Is Entitled To Procedural Protections Associated With The Imposition Of Criminal Sanctions

The government should not be permitted to use civil *in rem* forfeiture to deprive Good of his constitutional rights. Houses do not commit crimes, people do, and if the government wants to hold people accountable for those crimes by taking their property, it has the power to do so under the criminal forfeiture statutes. However, as those statutes reflect, the Constitution requires that certain fundamental procedural protections be observed. The government should not be permitted to eviscerate these constitutional protections by employing an untenable and archaic legal fiction.

Where, as here, "civil" forfeiture is punitive in purpose and effect, the government should be required to proceed under criminal forfeiture statutes that provide for the criminal due process protections required by the Constitution, including the presumption of innocence, the requirement of proof of guilt beyond a reasonable doubt, and the burden on the government to prove its case

based on competent (non-hearsay) evidence. *See, e.g., In re Winship*, 397 U.S. 358 (1970)(due process requires reasonable doubt standard in criminal cases); *Sullivan v. Louisiana*, __ U.S. __, 61 U.S.L.W. 4518 (June 1, 1993) (mistake in reasonable doubt instruction can never be harmless error).

This Court, however, need not go that far to agree with the Ninth Circuit that the absence of *any* pre-seizure hearing is irreconcilable with our fundamental notions of due process of law.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether the seizure of real property in a civil *in rem* forfeiture proceeding, without notice to the owner and an opportunity to be heard prior to the seizure, violates the Due Process Clause of the Fifth Amendment.

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No. 92-1180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE RESPONDENT

INTEREST OF THE AMICUS

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 7,000 attorneys and 28,000 affiliate members, including representatives from every state. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in its House of Delegates.

The NACDL was founded over thirty-five years ago to promote study and research in the field of criminal defense law; to disseminate and to advance knowledge of the law in the field of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers. Among the

NACDL's stated objectives is the promotion of the proper administration of criminal justice.

The NACDL has long been troubled by the ever expanding use of civil forfeiture proceedings in our criminal justice system. We have deep concerns about the fairness and wisdom of some of these laws and the aggressive way they are being used by federal and state prosecutors to inflict punishment and to deprive individuals of significant property interests without any of the constitutional and procedural protections generally accorded to either criminal or civil defendants. Like the Second Circuit Court of Appeals, we too "continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." *United States v. All Assets of Statewide Auto Parts, Inc.*, etc., 971 F.2d 896, 905 (2nd Cir. 1992).

Although an overwhelming majority of courts to have considered the issue have held that due process requires notice and an opportunity to be heard prior to the seizure of real property in the context of an *in rem* civil forfeiture proceeding, there remains a conflict among the circuits on this issue of recurring importance. Thus, the NACDL has a vital interest in the outcome of this case, and urges the Court to affirm the decision below.[1]

SUMMARY OF ARGUMENT

The Fifth Amendment Due Process Clause requires notice and an opportunity to be heard prior to the deprivation of any significant property right. Interests in real property, especially the home, have traditionally been afforded heightened constitutional protections.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

This Court has repeatedly held that only an extraordinary situation involving the need for very prompt action can justify postponement of notice and opportunity to be heard. In the case of real property, the need for such prompt action will rarely, if ever, be present because real property, unlike currency, conveyances, and other personal property, cannot be concealed, or removed from the jurisdiction of the court.

Applying the three prong test for due process analysis announced by this Court in *Mathews v. Eldridge*, 424 US 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976), the government's interest in seizing real property without notice and an opportunity for the owner to be heard is less compelling than the owner's interest in avoiding an erroneous deprivation of property. On balance, notice and an adversarial hearing is constitutionally required prior to the seizure of real property.

ARGUMENT

I. DUE PROCESS REQUIRES NOTICE AND AN OPPORTUNITY TO BE HEARD PRIOR TO THE DEPRIVATION OF ANY SIGNIFICANT PROPERTY INTEREST.

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge*, 424 US 319, 332, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976).[2]

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[2] Although Petitioner argues that the Fourth Amendment applies to the exclusion of the Fifth Amendment in civil forfeiture proceedings, Petitioner has not offered a single authority embracing, or even considering, this unique premise. On the contrary, this Court has previously held, under a due process analysis, that only extraordinary circumstances can justify the failure to provide preseizure notice and hearing in the context of a civil forfeiture proceeding. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 677-80, fn. 14, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974). The Court in *Calero-Toledo* did not address the question of whether the Fourth Amendment was

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 68 U.S. 223, 233, 17 L.Ed. 531, 534. *See, Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914; *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841; *Grannis v. Ordean*, 234 U.S. 385, 58 L.Ed. 1363, 34 S.Ct. 779. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L.Ed.2d 62, 66, 85 S.Ct. 1187.

Fuentes v. Shevin, 407 U.S. 67, 80-81, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972).

The right to a hearing prior to the deprivation of any significant property interest has long been recognized by this Court. Id., 407 U.S. at 82. Although the Court has held that due process tolerates variances in the form of a hearing "appropriate to the nature of the case," *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313, 94 L.Ed.2d 865, 872, 70 S.Ct. 652 (1950), and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," *Boddie v. Connecticut*, 401 U.S. 371, 378, 28 L.Ed.2d 113, 119, 91 S.Ct. 780, the Court has traditionally insisted that, whatever its form, opportunity for that hearing be provided *before* the deprivation at issue takes effect. *See, e.g., Bell v. Burson*, 402 U.S. 535, 542, 29 L.Ed.2d 90, 96, 91 S.Ct. 1586 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 27 L.Ed.2d 515, 519, 91 S.Ct. 507 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1111 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S.

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even applicable, let alone the exclusive source of constitutional protection in civil forfeiture seizures. *See*, discussion, *infra*, at pp. 6-10.

337, 339, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969); *Armstrong v. Manzo*, supra, 380 U.S. at 551, 14 L.Ed.2d. at 66; *Mullane v. Central Hanover Trust Co., supra*, 339 U.S. at 313, 94 L.Ed. at 872.

> "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.

Fuentes, supra, 407 U.S. at 82, 32 L.Ed.2d at 571 (emphasis in original). "In short, 'within the limits of practicability' a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie v. Connecticut, supra*, at 378-379, 28 L.Ed. 2d at 119.

Fuentes holds that such extraordinary situations "must be truly unusual," and justify postponement of notice and an opportunity to be heard only where each of the following three elements are present: (1) the seizure is directly necessary to secure an important governmental or public interest; (2) there has been a special need for very prompt action; and (3) the seizure was initiated by a governmental official responsible for determining, under the standards of a narrowly drawn statute, that the seizure was necessary and justified. 407 U.S. at 91.

To the extent that there could have been any doubt after *Fuentes* that only an extraordinary situation involving the need for prompt action can justify postponement of notice and an opportunity to be heard, such doubt was put to rest by this Court in *Connecticut v. Doehr*, 501 U.S. ___, 115 L.Ed.2d 1, 111 S.Ct. 2105 (1991). In *Doehr*, a private individual sought to attach Doehr's home pursuant to the Connecticut attachment statute. An application to attach Doehr's home, supported by an af-

fidavit, was submitted to a superior court judge in an *ex parte* proceeding. The judge, on the basis of the affidavit, found probable cause and ordered the attachment.

This Court held that the Connecticut statute was unconstitutional as applied, because "there was no allegation that Doehr was about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his real estate unavailable to satisfy a judgment." *Id.*, 115 L.Ed. 2d at 16. Reaffirming the requirement that only exigent circumstances can justify postponement of notice and an opportunity to be heard prior to "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail," the Court stated

> Yet there is no allegation that Doehr was about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his real estate unavailable to satisfy a judgment. Our cases have recognized such a properly supported claim would be an exigent circumstance permitting postponing any notice or hearing until after the attachment is effected. *See Mitchell, supra*, at 609, 40 L.Ed.2d 406, 94 S.Ct. 1895; *Fuentes, supra*, at 90-92, 32 L.Ed.2d 556, 92 S.Ct. 1983; *Sniadach*, 395 U.S., at 339, 23 L.Ed.2d 349, 89 S.Ct. 1820. Absent such allegations, however, the plaintiff's interest in attaching the property does not justify the burdening of Doehr's ownership rights without a hearing to determine the likelihood of recovery.

Id., 115 L.Ed.2d at 16-17. Finally, the Court concluded that

> the Connecticut provision before us, by failing to provide a preattachment hearing without at least requiring a showing of some exigent circumstances clearly falls short of the demands of due process.

Id., 115 L.Ed.2d at 18.

II. THE REQUIREMENT THAT ONLY EXIGENT CIRCUMSTANCES CAN JUSTIFY THE FAILURE TO PROVIDE PRESEIZURE NOTICE AND AN OPPORTUNITY TO BE HEARD APPLIES IN THE CONTEXT OF CIVIL *IN REM* FORFEITURE PROCEEDINGS.

This Court has previously held that due process does not require preseizure notice and an opportunity to be heard where the property seized was a yacht. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 677-80, 40 L.Ed.2d 452, 94 S.Ct. 2080. Reviewing the *Fuentes* criteria justifying seizure of property absent notice and an opportunity to be heard, the Court concluded that "in *these* circumstances we hold that this case presents an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process."[3] (emphasis added).

Specifically, the Court found that (1) seizure under the Puerto Rican statute served a significant governmental purpose by allowing Puerto Rico to assert *in rem* jurisdiction over the property, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions; (2) preseizure notice and hearing might frustrate the interests served by the statute, "since the property seized — as here, a yacht — will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed if advance warning

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[3] The Court's holding was expressly limited to the specific facts there presented:

> Since, however, our holding is that preseizure notice and hearing are not required by due process in the context of *this* forfeiture, we have no occasion to remand . . .

Calero-Toledo, supra, 416 U.S. at 677-78, fn. 12 (emphasis added).

of confiscation were given;" and (3) unlike the situation in *Fuentes*, the seizure was "not initiated by self-interested private parties." 416 U.S. at 679.

In seizures of real property, however, none of the three *Fuentes* criteria justifying seizure without notice and an opportunity to be heard exist. First, in the case of real property, there are less intrusive ways of asserting jurisdiction over the res, such as merely posting the property. *See, e.g., United States v. TWP 17 R 4, Certain Real Property in Maine*, 970 F.2d 984 (1st Cir. 1992).

Second, with real property, the "need for very prompt action" is rarely present.[4] Unlike personal property, such as currency or a yacht, real property is not movable, nor readily concealable. There is no danger that it will be removed from the court's jurisdiction or that it will be concealed from the court. Although there is always the possibility that improvements upon real property can be destroyed, the mere possibility, without more, cannot justify seizure without notice. In those rare cases where the government can present to a court specific, articulable facts that an owner will attempt to destroy real property if given advance warning of a seizure, such facts (if coupled with the other two *Fuentes* criteria) might constitute the "need for very

[4] At the time *Calero-Toledo* was decided, 21 U.S.C. §881 did not authorize the seizure or forfeiture of real property used or intended to be used to facilitate a violation of Title 21. 21 U.S.C §881(a)(7), making real property subject to seizure and forfeiture, was adopted in 1984.

[5] Given that Petitioner argues that the normal practice is to allow the owner of real property to remain in the premises even after the property has been seized, it is hard to understand how seizure without notice will prevent destruction of the property after such a seizure. Even in those instances where the government refuses to consent to an occupancy agreement and removes the owner from the property, nothing short of posting round the clock guards and placing barricades around the property can prevent a truly disgruntled owner from returning to the property and destroying it even after a seizure without notice. Thus, as a practical matter, seizure without notice offers little,

prompt action" justifying seizure without notice.[5] Similarly, if the government can establish that there are other exigent circumstances, such as ongoing drug trafficking, seizure without notice is constitutionally permissible. *See, e.g., United States v. 141st Street Corp.*, 911 F.2d 870 (2nd Cir. 1990), *cert. denied*, 111 S.Ct. 1017 (1991).

Further, Petitioner's argument that the "contents [of a residence] (which may also be subject to forfeiture if used in, or the proceeds of, a drug transaction) can be 'concealed'," Petitioner's Brief, pp. 29-30 is, at best, misleading. If the government has probable cause to believe that personal property located within a residence is subject to seizure and forfeiture, it must obtain a separate warrant to seize such property.[6] Once a warrant is obtained, however, such personal property may be seized without notice and an opportunity to be heard. *Calero-Toledo, supra.*

Finally, unlike the situation in *Calero-Toledo*, which involved the seizure of a yacht by Puerto Rican officials in May of 1972, it is now clear that the government is a "self-interested private part[y]" in civil forfeiture proceedings. Although not "private," law enforcement agencies are unquestionably self-interested. Under federal law enacted in 1984, forfeited assets no longer go into the general treasury. Instead, the property (or the money derived from its sale) is allocated exclusively for law

if any, protection against destruction of the property. Indeed, it may be more likely that damage to the property will occur as a result of forced entry by law enforcement officers.

[6] Although 21 U.S.C. §881(b)(4) purports to authorize the seizure of property without process when the attorney general "has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter," there is no "forfeiture seizure" exception to the Fourth Amendment's warrant requirement. It is elementary that Congress cannot authorize by legislation what the Constitution forbids. *Marbury v. Madison*, 5 U.S. 87 (1803). *United States v. LaSanta*, 978 F.2d 1300 (2nd Cir. 1992).

enforcement purposes. *See*, 28 U.S.C. §524. Thus, the government has a direct financial interest in the outcome of civil forfeiture actions.

That the government's pecuniary interest has been taken to heart by the Department of Justice is readily apparent from an August 1990 memorandum from the Attorney General, warning U.S. Attorneys that the Department was far short of its goal of $470 million in forfeiture deposits with only three months remaining in fiscal year 1990:

> "We must significantly increase production to reach our budget target . . . Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990."

Executive Office for U.S. Attorneys, U.S. Department of Justice, 38 U.S. Attorney's Bulletin, 180 (Aug. 15, 1990) (quoted in Gary M. Maveal, *The Unemployed Criminal Alternative in the Civil War of Drug Forfeitures*, American Criminal Law Review, Vol. 30:35, 49-50 (1992)).

More than one court has voiced concern over this conflict of interest inherent in forfeiture proceedings.

> "More and more courts are voicing frustration at what appears to be overreaching by the United States in the drug war, particularly in forfeiture cases where law enforcement agencies have a 'built-in' conflict of interest because they share in the product of the seizure.

United States v. That Certain Real Property Located at 632-636 Ninth Avenue, Calera, Alabama, 798 F. Supp. 1540 (N.D. Ala., 1992). *See also, United States v. All Assets of Statewide Auto Parts, Inc., etc.*, 971 F.2d 896, 905 (2nd Cir. 1992):

> "We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes. The district courts, in order to preserve some modicum of due process to criminal defendants [and civil forfeiture claimants] should be vigilant in approving seizures *ex parte* only upon a showing of exigent circumstances, and whenever possible should favor less drastic measures . . .

Id., 971 F.2d at 905.

The Court has traditionally recognized the need for special scrutiny where the government stands to benefit financially from the imposition of sanctions as a result of criminal conduct:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit. *See United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25-26, 52 L.Ed.2d 92, 97 S.Ct. 1505 (1977);*Perry v. United States*, 294 U.S. 330, 350-351, 79 L.Ed.2d 912, 56 S.Ct. 432, 95 ALR 1335 (1935).

Harmelin v. Michigan, 115 L.Ed 2d 836, 854, n.9 (1991) (Scalia, J. concurring); *See also, Ward v. Village of Monroeville*, 409 U.S. 57, 34 L.Ed.2d 267, 93 S.Ct. 80 (1972); *Tomey v. Ohio*, 273 U.S. 510, 71 L.Ed.2d 749, 47 S.Ct. 437 (1927). Given the government's direct and substantial pecuniary interest in civil forfeiture proceedings, a governmental seizure of property without notice or an opportunity to be heard warrants close

judicial scrutiny, and should be allowed only upon a clear showing of extraordinary circumstances.

III. THE OVERWHELMING MAJORITY OF COURTS TO HAVE CONSIDERED THE ISSUE HAVE HELD THAT DUE PROCESS REQUIRES NOTICE AND AN OPPORTUNITY TO BE HEARD PRIOR TO THE SEIZURE OF REAL PROPERTY.

The issue of whether due process requires notice and an opportunity to be heard prior to the seizure of real property in a civil *in rem* forfeiture has been squarely decided by the Second Circuit Court of Appeals. *United States v. Property at 4492 S. Livonia Rd.*, 889 F.2d 1258 (1989). In an incisive and well reasoned opinion, the court found that 21 U.S.C. §881 (a)(7) — the same statute under which the instant forfeiture was brought — implicated two basic constitutional principles. First, notice and an opportunity for hearing must generally precede the taking of an individual's property absent exigent circumstances. Second, an individual's expectation of privacy and freedom from governmental intrusion in the home merits special constitutional protection. See, *e.g. United States v. Karo*, 468 U.S. 705, 714, 82 L.Ed.2d 530, 104 S.Ct. 3296 (1984); *Payton v. New York*, 445 U.S. 573, 590, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980). Id., 889 F.2d at 1264.

The court then conducted an analysis of the three factors identified in *Mathews v. Eldridge, supra*, 424 U.S. at 335, to determine the constitutional adequacy of the preseizure *ex parte* procedure afforded the owner of the property.[7] The court concluded (1) that the owner's interest in the use and enjoyment of the home was substantial; (2) that although an ex parte probable cause determination before a neutral and detached magistrate reduces the possibility of an erroneous deprivation, preseizure notice and an opportunity to be heard would certainly further minimize that risk; and (3) the government's interest is the narrow one of seizing real property without notice and hearing, not the broader general interest in forfeiting property and enforcing the drug laws.

[7] The three factors identified in *Mathews* are:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge, supra*, 424 U.S. at 335.

Turning to the ultimate question of whether the due process balance favors the homeowner or the government where the property seized is a residence, the Second Circuit looked to whether there were exigent circumstances sufficient to warrant the postponement of notice and the opportunity for an adversarial hearing. In deciding that the balance favored the homeowner, the Court held that

> As a general matter, a showing of exigent circumstances seems unlikely when a person's home is at stake, since, unlike some forms of property, a home cannot be readily moved or dissipated. *Cf. United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555, 562 & n. 12, 103 S.Ct. 2005, 2011 n. 12, 76 L.Ed.2d 143 (1983) (seizure of currency); *Calero-Toledo*, 416 U.S. at 679, 94 S.Ct. at 2089 (seizure of pleasure yacht).

Livonia Road, 1889 F.2d at 1265. The court also noted that any exigency that might be posed by the threat of the owner placing an encumbrance on, or transferring, the property could be met by means less restrictive than seizure of the property without notice. Finally, the court noted that the government had waited at least six months after discovering the unlawful use of the property before instituting the forfeiture action, thus belying any claim of exigency.

The vast majority of courts to have considered this issue since the decision in *Livonia Road* have followed the Second Circuit's lead, holding that due process requires notice and an opportunity to be heard prior to the seizure of real property in the context of civil forfeiture proceedings. *See, e.g., United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896 (2nd Cir. 1992); *United States v. A Parcel of Land, Buildings, Appurtenances, and Improvements Known as 92 Buena Vista Avenue*, 937 F.2d 98, 101 (3rd Cir. 1991) (dicta), *aff'd on other grounds*, 507 U.S. ___, 122 L.Ed.2d 469, 113 S.Ct. 1126 (1992); *Richmond Tenants Organization, Inc. v. Kemp*, 956 F.2d 1300 (4th Cir. 1992) (forfeiture of tenant's leasehold interests); *United States v. Certain Real Property Located at Hanson Brook, Town House Road, etc.*, 770 F.Supp. 722 (D. Me. 1991); *United States v. Two Parcels of Property Located at 185 and 191 Whalley Avenue, New Haven, Conn.*, 774 F.Supp. 87 (D.Conn. 1991); *United States v. Property at 850 S. Maple, Ann Arbor, Mich.*, 743 F.Supp. 505 (E.D. Mich. 1990); *United States v. Parcel 1, Beginning at Stake*, 731 F.Supp. 1348 (S.D. Ill. 1990); *United States v. 14128 South School Street, Riverdale, Illinois, et, al.*, 774 F.Supp. 475 (N.D. Ill. 1991); *United States v. 8215 Reese Road, Harvard, Illinois*, 803 F.Supp. 175 (N.D. Ill. 1992); *United States v. That Certain Real Property Located at 632-636 Ninth Avenue, Calera, Alabama*, 798 F.Supp. 1540 ((N.D. Ala. 1992); *Department of Law Enforcement v. Real Property*, 588 So.2d 957 (Fla. 1991). *See also, Application of Kingsley*, 802 F.2d 571 (1st Cir. 1986), decided prior to *Livonia Road*.

Those few courts which have held that due process does not require notice and opportunity to be heard prior to the seizure of real property in the context of a civil forfeiture proceeding have failed to engage in any analysis or discussion of the governmental and private interests involved (the *Mathews* factors), or failed to consider the significant differences between real property and personal property. *See, e.g. United States v.*

A Single Family Residence & Real Property Located at 900 Rio Vista Blvd., 803 F.2d 625, (11th Cir. 1986); *United States v. Certain Real Estate Property Located at 4880 S.E. Dixie Highway*, 838 F.2d 1558 (11th Cir. 1988).

IV. UNDER THE THREE PRONG TEST ANNOUNCED IN *MATHEWS V. ELDRIDGE*, THE GOVERNMENT'S INTEREST IN SEIZING REAL PROPERTY WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD IS OUTWEIGHED BY THE PROPERTY OWNER'S NEED FOR A PRESEIZURE ADVERSARIAL HEARING.

As noted above, this Court's previous holdings clearly and unmistakably demonstrate that the presence or absence of exigent circumstances remains a crucial factor in determining the constitutionality of *ex parte* procedures. When exigent circumstances are absent, as they were in the case at bar, and as is typical in the context of civil forfeiture actions involving real property, the government's interest in seizing property must give way to the owner's superior interest in the property. An analysis under the three prong *Mathews* inquiry is thus appropriate.

1. The Property Owner's Interest.

Under this prong, the court must evaluate the owner's interest in protecting real property from being seized. This interest is clearly significant. This Court has previously held that a similar interest in protecting houses from prejudgment attachment was "significant," concluding that it was subject to the strictures of due process. *Doehr*, 115 L.Ed.2d at 14. Moreover, when property rights are at issue, so too are liberty rights. As Justice Stewart wrote for this Court:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy proper-

> ty without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the property in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without he other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552, 31 L.Ed.2d 424, 92 S.Ct. 1113 (1972).

Although the government argues that "the only real change wrought by the typical seizure is that the owner's continued occupancy is subject to an agreement that recognizes the United States' interests in protecting its claim to the property . . .", Petitioner's Brief, p. 32, such seizures clearly restrict the owner from alienating or encumbering the property.[8]

> [T]he property interests that attachment affects are significant. For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause.

Doehr, 115 L.Ed.2d at 14. Like the State in *Doehr*, Petitioner argues that seizures do not typically amount to complete, physical or permanent deprivation of real property. However,

[8] That the government may enter into an occupancy agreement with the owner of the property does not undo the constitutional harm, since the government "allow[s] such continued occupancy as a matter of grace, not entitlement." *Livonia Road*, 889 F.2d at 1265.

> [T]he Court has never held that only such extreme deprivations trigger due process concerns. *See Buchanan v. Warley*, 245 U.S. 60, 74, 62 L.Ed. 149, 38 S.Ct. 16 (1917). To the contrary, our cases show the temporary or partial impairment to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection.

Doehr, 115 L.Ed.2d at 14.

Similarly, occupancy agreements restrict the owner's use of the property, and require waiver of constitutional rights by providing for governmental entry and inspections.

2. The Risk of Erroneous Deprivation.

This Court has emphasized that, especially where a party has a pecuniary interest in the outcome, "making realistic assessments" of the merits of a case based on *ex parte* showings is difficult because these showings can be "one-sided, self-serving, and conclusionary." *Doehr*, 115 L.Ed.2d at 15. The Court noted:

> The likelihood of error that results illustrates that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . [And n]o better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72, 95 L.Ed.2d 817, 71 S.Ct. 624, 647-649 (1951) (Frankfurter, J., concurring).

Doehr, 115 L.Ed.2d at 15-16. The fact that property owners are ultimately entitled to a trial on the merits *after* the seizure does not materially reduce the risk of erroneous deprivation.[9] Fur-

[9] See, *e.g.*, *United States v. Real Property Located at 110 Collier Drive*, 793 F.Supp. 1048 (N.D. Ala. 1992):

thermore, a trial on the merits, which is the only hearing following the seizure authorized by statute, may not take place for many months, or even years, after the seizure. Property owners are subject to crowded civil calendars, and the government may, at its option, obtain a stay of the forfeiture proceeding upon the filing of an indictment or information in a related criminal proceeding. *See*, 21 U.S.C. §881(i). Even if it is later determined that probable cause did not actually exist, such a post seizure finding "would not cure the temporary deprivation that an earlier hearing might have prevented." *Doehr*, 115 L.Ed.2d at 16. Thus, the *ex parte* procedures create a considerable risk that real property will be erroneously seized.

3. The Governmental Interest.

The governmental interest to be considered is the government's interest in seizing real property without notice, not the government's interest in forfeiting property. The government's interest in seizing real property to deter illegal drug use would not be affected by requiring an adversarial hearing prior to the seizure. With an adversarial hearing, the government would still be able to initiate forfeiture proceedings, to provide a significant deterrent to drug trafficking, and to enhance revenue for law enforcement, while at the same time protecting the property owner from an erroneous deprivation of property rights.

Finally, the government has framed its interest in *ex parte* seizures as one placing the owner on notice of the government's "interest in protecting its claim to the property." Petitioner's

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> The United States has visited an injustice on Julie Moon [the property owner] and it has misled this court into the role of an unwitting participant . . . The Court shares some of the blame for this travesty of justice. It should have more closely examined the affidavits of the state law enforcement officials whose agencies stand to gain financially as a result of the forfeiture.

Id., at 1052.

Brief, at 32. With real property, this narrow governmental interest can be satisfied simply by commencing the forfeiture action. Thus, neither physical occupancy by the government, nor the coerced imposition of an occupancy agreement is necessary to preserve the government's interest.

The balancing of the *Mathews* factors in this context is straightforward. Absent exigent circumstances, the government's interest in seizing real property without notice and an opportunity for the owner to be heard is simply not more compelling than the property owner's interest in participating in a preseizure adversarial hearing.

CONCLUSION

For the foregoing reasons, the NACDL as amicus curiae respectfully urges this Court to affirm the decision of the Ninth Circuit Court of Appeals holding that due process requires notice and an opportunity to be heard prior to the seizure of real property in a civil forfeiture proceeding.

Respectfully submitted,

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June 14, 1993

No. 92-1180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,

Petitioner,

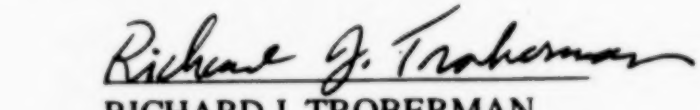
v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.,

Respondent.

CERTIFICATE OF SERVICE

It is hereby certified that both parties to this case have been served three copies of the Brief of Amicus National Association of Criminal Defense Lawyers in Support of Respondent by mail on June 14, 1993.



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